No. 405.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY, (A Corporation,)
Appellant,

ads.

THE UNITED STATES OF AMERICA,
Appellee.

Appellant's Brief.

C. W. CROSS,
Solicitor for Appellant.

Filed..... *1898.*

.....*Clerk.*

By..... *Deputy.*

In the United States Circuit Court of Appeals, for the Ninth Circuit, upon Appeal from the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (A CORPORATION),
Appellant,

ads.

THE UNITED STATES OF AMERICA,
Appellee.

Appellant's Brief.

In this case the question involved is, whether or not a hydraulic mine situated upon the water-shed of the Sacramento River, and remote from its navigable streams, and carrying on its operations in such a way as to do no injury to the navigable streams, or to the lands adjacent thereto, can be properly enjoined at suit of the United States, merely because the owners of such hydraulic mine have not obtained from the California Debris Commission a permit to mine by the hydraulic process.

The legislation upon which the United States relies is an Act of Congress, commonly known as the "Caminetti

Act," and contained in the 27th U. S. Statutes at Large, pages 507–511.

The question upon appeal arises solely upon the pleadings and judgment; a judgment and decree, enjoining the appellant from mining by the hydraulic process, having been rendered and entered upon an order sustaining a demurrer to the appellant's answer, no trial of any question of fact having been had.

THE RECORD.

The appellee, the United States of America, filed its bill of complaint in equity in the Circuit Court of the United States, Ninth Circuit, Northern District of California, alleging the passage of "An Act to create the California Debris Commission and regulate hydraulic mining in the State of California," approved March 1, 1893. (See Transcript, p. 1.) That, under and in compliance with said Act, the commissioners provided for therein had been duly appointed, and entered upon the discharge of their duties. (See Transcript, p. 2.) That the appellant, the North Bloomfield Gravel Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its residence in San Francisco, California. That it is a gold mining company, and has its mines near the town of North Bloomfield, in Nevada County, California, and that said company carries on its mining operations by the hydraulic process, and that its mines are situated on or near the Yuba River and its forks and tributary branches, within the territory drained by the Sacramento River, and in the Northern District of California. (See Transcript, p. 3.) That the

waters used at said mine find their way, following their natural course, through navigable streams, bays, and straits, to the Pacific Ocean. (See Transcript, pp. 3, 4, and 5.) That the said company so discharges the mining debris from its said gold mine as that the same, or a portion thereof, is ultimately carried and flows into the Yuba River, its forks and tributaries, with mining debris from other mines operated by the hydraulic process, and is thence carried into the Feather and Sacramento Rivers and the bays and straits of the Northern District of California. (See Transcript, p. 5.) The bill of complaint then describes the process of hydraulic mining, being a method of washing gold-bearing gravel from its place of natural deposit, and separating the gold from the gravel and other like materials. (See Transcript, pp. 5, 6, and 7.) That the said company has never petitioned for, or obtained from, the California Debris Commission, any permit to mine by the hydraulic process, (See Transcript, pp. 7 and 8.) The prayer of the bill is for an injunction, restraining said company from doing any further hydraulic mining, until it shall have obtained a permit so to do from the said California Debris Commission. (See Transcript, pp. 8 and 9.)

L. L. Myers was made a party to the original bill, said bill stating that he was the superintendent of said company. Upon due proceedings had, an order was made, dismissing the bill as to said Myers. (See Transcript, pp. 15 to 19.)

The appellant demurred to the bill, on the ground that said bill had not made or stated such a cause as entitles the United States in a court of equity to any discovery

from said company, or to any relief against said company, as to the matters contained in said bill, etc., and asked to be hence dismissed, which demurrer was overruled. (See Transcript, pp. 20 to 23, inclusive.) The appellant thereupon duly filed and served its answer to the bill of complaint, admitting that the appellant was carrying on the business of hydraulic mining at the place alleged in said bill, but denied that said mines were situated on or near the Yuba River or any of its forks, but alleging that said mines were situated adjacent to Humbug Creek, a small tributary of one of the branches of the said Yuba River. Denied that the Yuba River is or ever was a navigable water, or a free highway for the use and purpose of navigation, except that portion of said Yuba River extending from its mouth up stream a distance of about one-half mile, and alleging that said portion of said Yuba River, at ordinary low stages, for more than thirty years, has not been navigable for steamers of any draught whatever. (See Transcript, pp. 24 to 27.)

The bill further denied that the appellant so dumped or discharged the mining debris from its said mines, or either or any of them, in such manner that the same or any material portion thereof is ultimately carried or flows into the said Yuba River, or that then, or with mining debris from other gold mines operated by the hydraulic process of mining, that the same is carried or flows into the Feather or Sacramento, or any other navigable streams, or thence into other waters, bays, or straits, in the bill of complaint mentioned. (See Transcript, p. 27.) The answer then alleges that all of the mining debris from its mines is dumped and discharged into impounding

basins and reservoirs, constructed upon its own lands at and adjacent to its said mines, and that no material part of such mining debris from its mines, etc., is carried from said impounding works, or flows into the adjacent streams or canyons, or any other place from which it is carried or moved by water into the said streams. The answer admits that an immaterial quantity of the smaller or lighter portions of said debris is carried down said streams, but denies that the same or any portion whatever of said mining debris is lodged or deposited in said rivers or any of them, or in their channels or any of them, or on the lands adjacent thereto or any of them; but on the contrary avers, that only a trifling quantity of such mining debris escapes from or passes beyond the impounding works and reservoirs of said appellant, and that the same consists solely of light, flocculent matter, of about the same specific gravity as water, and so finely comminuted as to readily float in and be moved forward by the slightest movement of the water in which it is suspended; and that all of said matter so escaping from or passing beyond appellant's impounding works, is carried in suspension in the streams of water of said streams, until it reaches the Suisun Bay; and that from the head of Suisun Bay, by the tidal currents, and movements of the water of said Suisun Bay, Carquinez Straits, San Pablo Bay, and the Bay of San Francisco, and the tidal currents passing in and out of the Golden Gate, it is carried and swept into the ocean, at distances remote from the land or navigable streams of the State of California, and does not deposit in any place where it either injures or threatens to injure any navigable waters within the juris-

diction of the United States. The answer further denies, that since the passage of said act, that any portion of the mining debris from its mines has been deposited or lodged, or is still being deposited or lodged, in the beds and channels, or the beds or bed, or channels or channel of said rivers or any of said rivers; and also denies that the same will continue to be so deposited or lodged from appellant's said mines, mining grounds or works, while such hydraulic mining continues, or otherwise, or at all. (See Transcript, pp. 28 and 29.) The answer admits that said company has never applied for or obtained a permit from the California Debris Commission to mine by the hydraulic process, and further alleges that it is not bound to file such petition, or to make the written conveyance provided for in said Act of Congress, but that said company has an option to or not to make or file, or present to or with said California Debris Commission, a petition or written deed or other instrument in writing, such as is referred to in paragraph VI, of said complainant's bill of complaint. (See Transcript pp. 30–31, paragraphs VIII and IX.) The answer then alleges that about the years 1887 and 1888, the respondent erected extensive and expensive impounding works upon lands patented to it by the United States, at and adjacent to its mines, and that the debris from its said mines and mining operations is deposited in said impounding works, and that none of said debris escapes from said impounding works, except some light flocculent matter of such slight specific gravity, that it will not deposit in water when affected by any movement, and that all of such matter escaping from said impounding works is carried by the current of

waters of Humbug Creek into Yuba River, by the currents of the Yuba River into the Feather River, and by the Feather River into the Sacramento River, and by the Sacramento River into Suisun Bay, where by the tidal and other currents the water is kept in constant motion, and from said Suisun Bay such light, flocculent matter is, by said currents and tides, carried through the Straits of Carquinez, San Pablo Bay, the Bay of San Francisco, and discharged into the Pacific Ocean at points remote from and out of the jurisdiction of the United States. (See Transcript, pp. 31–32, paragraph X.) The answer then alleges that heretofore a suit was brought by the same complainant against the same respondent, to enjoin it from operating its hydraulic mines, upon the ground that the debris from its mines injured, or threatened to injure, the same navigable waters and the lands adjacent thereto. That said suit was brought after said impounding works had been constructed. That a trial was had of said action, and that therein it was judicially and finally determined that the mining operations of said respondent, by use of said impounding works, neither did nor threatened any injury to any navigable waters, or any lands adjacent to such navigable waters. And the answer further alleged that the mining operations of said respondent ever since have been, and still are, conducted in the same manner and by the use of the same impounding works as were involved in said suit, and that its mining operations will not be conducted in any other or different manner than were determined in said action to be non-injurious. The answer denied all combination and confederacy, and was duly verified.

DEMURRER TO THE ANSWER.

The complainant demurred to the answer, on the ground that said answer neither made nor stated any case or defense to the equity or cause of action set forth in the amended bill of complaint, and in effect prayed for a judgment upon the pleadings. There were also exceptions to the answer, upon the same ground, and a motion to strike the answer from the files. (See Transcript, pp. 38 to 41.)

DECREE.

The Court, upon these pleadings, sustained the demurrer to the answer to the bill of complaint, and adjudged that the respondent be enjoined from conducting any further hydraulic mining operations until it should obtain a permit so to do from the California Debris Commission.

THE CASE IN BRIEF.

The complainant alleged that the respondent was mining by the hydraulic process upon the water-shed of the Sacramento River without first having obtained a permit from the California Debris Commission.

The answer admitted that the respondent had not obtained a permit from the California Debris Commission, and had never applied for one, or otherwise by its voluntary act, come under the jurisdiction of the Commission; but alleged that such mining operations as it conducted, or intended to conduct, neither did nor threatened any injury to any navigable waters or any lands adjacent thereto.

Without determining any issue so raised, the Honorable, the Circuit Court, decreed a final injunction against

the respondent doing any hydraulic mining until it should have obtained a permit from the California Debris Commission.

RESPONDENT'S POINTS.

The respondent makes two points:—

First: That, under the Act of March 1, 1893 (27 U. S. Statutes at Large, pp. 507–511), that one is not prohibited from carrying on the business of hydraulic mining without first granting to the United States the right to control its mining operations, as in said Act provided, and obtaining a permit from the California Debris Commission; but that said Act grants to the owner of a hydraulic mine the right to apply for such permit, upon the condition of making said grant; and that, if he obtains such permit, he obtains all the benefits, privileges, and advantages, which the law provides, under such permit.

Second: That, in no case, will a court enjoin the conduct of a lawful business, so long as the same is so conducted as neither to do nor threaten any injury whatever.

Point I.

That, under the Act of March 1, 1893 (27 U. S. Statutes at Large, pp. 507–11), that one is not prohibited from carrying on the business of hydraulic mining without first granting to the United States the right to control its mining operations, as in said Act provided, and obtaining a permit from the California Debris Commission; but that said Act grants to the owner of a hydraulic mine the right to apply for such permit, upon the condition of making said grant; and that, if he obtains such permit, he obtains all

the benefits, privileges. and advantages, which the law provides, under such permit.

The discussion of this point involves the relative powers of the State and of the Nation, as well as the right of the general government to interfere, except for purposes of revenue, police power, etc., with the ownership and use of private property held in private ownership within the limits of a state; and also the right of the general government to compel one who owns property, to grant the control of that property (which is the chief element of ownership) to the United States Government, and to obtain a permit from federal officers to use its property in a productive industry, when the actual and proposed use of said property neither does nor threatens any injury to anyone or anything. It is a well known fact that a large proportion of the agricultural lands on the water-shed of the Sacramento River cannot be cultivated for ordinary agricultural or horticultural purposes (as the plowing and other cultivation of the soil makes it loose and friable), without the result being that the winter rains wash some of the lighter portions of the soil into the navigable streams. The great Missouri River, and the Mississippi River below the mouth of the Missouri, and the James River, carry very large quantities of silt and other light flocculent matter, and this matter is largely the product of the cultivation of the fields. Would it be competent for the United States Congress to pass a law that no man should engage in agriculture, or plow or hoe, or harrow a field upon the water-shed of the Missouri River, or the Mississippi River, or the James River,

without first making a grant in the form of a deed, of the lands owned by the grantor, to the United States, granting to the United States, through a commission appointed by it, the right to say how much of his land the farmer should plow, or hoe or harrow, or how much wheat or corn he should raise, and compel the farmer, upon making such grant, to apply for a permit to farm and, without making such grant, or obtaining such permit, to provide that all farming within those vast water-sheds should be alsolutely prohibited until the owners of the land should surrender to the Government of the United States the entire control of their farming operations?

If that would not be rightful, within the powers of the general government, then certainly the right to mine by hydraulic process, which is a lawful, productive industry, by every natural right upon an equal footing with farming, cannot be constitutionally prohibited by the national government until the owner of the mine shall have, by writing, in the form of a deed, granted to the general government the right, by commission, to determine how much mining he shall do.

Under the law and the pleadings in this case, should the demurrer to the answer be sustained? That is the question involved. Differently stated, the question is: Must one be enjoined by the Court, who, without permit from the California Debris Commission, mines by the hydraulic process, but thereby neither does, nor threatens, injury to the navigable streams, nor to the lands adjacent thereto?

Hydraulic mining, in itself, is not an unlawful, illegitimate, or wrongful business.

This has been judicially determined.

County of Yuba v. *Cloke*, 79 Cal., p. 239.

In this case the Court in Bank says (*Vide*, p. 243):

"It seems to us, it must be conceded that the business "of hydraulic mining is not within itself unlawful, or "necessarily injurious to others. The unlawful nature "of the business results from the manner in which it is "carried on, and the neglect of parties engaged therein "to properly care for the debris resulting therefrom, "whereby it is allowed to follow the stream, and "eventually cause injury to property situated be- "low. * * * The business of hydraulic mining, "properly conducted, is lawful."

This decision preceded the legislation involved, which complainant's counsel designates in his brief as the "Caminetti Act." Then, as that Act relates alone to California, the Act will be construed as passed with relation to that decision, and as subject to construction by reference to it. But the Act in question bears evidence, inherent, that it was framed with reference to this decision, and to the principle declared in the decision.

Section 3 provides: "Hydraulic mining, as defined "in Section eight hereof, *directly or indirectly injuring* "*the navigability of said river systems*, carried on in said "territory, other than as permitted under the provisions "of this Act, *is hereby prohibited and declared unlawful.*"

And again, in Section 22: "And any person or per-

" sons, company or corporation, their agents or employes, " who shall mine by the hydraulic process, *directly or* " *indirectly injuring the navigable waters of the United* " *States*, in violation of the provisions of this Act, shall " be guilty of a misdemeanor, and upon conviction " thereof shall be punished by fine," etc.

It is provided by Section 4 that " it shall be the duty " of said Commission to mature and adopt such plan or " plans * * * as it may deem necessary, as will " improve the navigability of all the rivers comprising " said systems, deepen their channels, and protect their " banks. Such plan or plans shall be matured with a " view of * * * *and permitting mining by the* " *hydraulic process*, as the term is understood in said " State, to be carried on, *providing the same can be* " *accomplished without injury to the navigability of said* " *rivers, or the lands adjacent thereto.*"

In the quotations is a clear recognition of the principles announced in the case of *Yuba County* v. *Cloke*, *supra*.

The Act under consideration involves, apparently, four purposes:

(1) The appointment of the California Debris Commission by the President of the United States, and its organization;

(2) That the Commission shall collect information with regard to hydraulic mining, " debris from mining opera- " tions, natural erosion, or other causes," and the navigable waters, and furnish the same to the proper department of the United States Government;

(3) That the Commission shall devise and report meth-

ods of improving the navigable streams, and impounding mining debris, and for the construction of such general works as will permit hydraulic mining without injury to the navigable streams or the adjacent lands;

(4) To hear applications and grant permits to individual mine owners to erect impounding works, and provide for the impounding of the debris from their several respective mines.

The proper construction of the Act will be aided by a consideration of the foregoing classification.

Section 3 provides that "the jurisdiction of said Com-" mission, in so far as the same affects mining carried on " by the hydraulic process, shall extend to all such min-" ing in the territory drained by the Sacramento and San " Joaquin River systems in the State of California." Then, after prohibiting hydraulic mining injuring the navigability of said river systems, it proceeds to define what that jurisdiction is. The Act then provides for examinations and reports of the hydraulic mines, debris, and Sacramento and San Joaquin River systems.

The jurisdiction, territorily defined, is "the territory " drained by the Sacramento and San Joaquin River " systems." (*Vide*, Sec. 3.)

The subjects of its jurisdiction are:

(1) To mature and adopt plans, from examination and surveys, to improve the navigability of the rivers; such plans to be effective against mining debris, with a view of restoring the original condition of the rivers, and permitting mining by the hydraulic process, where it can be carried on without injury to the navigability of the rivers or the lands adjacent thereto. (See Sec. 4.)

(2) To examine, survey and determine the utility and practicability of storage sites and settling reservoirs; to improve and protect the navigable rivers by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes; to investigate such hydraulic and other mines as are, or have been, worked by methods intended to restrain the debris by impounding dams, etc., and make such study and researches of the hydraulic mining industry as will be useful in devising a method, or methods, whereby such mining may be carried on. (Section 5.)

(3) From time to time to note the conditions of the navigable channels of said river systems. (See Sec. 6.)

(4) To make reports annually to the Chief of Engineers, for the information of the Secretary of War, of its labors, plans and estimated cost of such works as it shall recommend. (See Sec. 7.)

(5) To grant to such mine-owners as shall properly petition therefor, and accompany such petition with the requisite grant, permission to mine by the hydraulic process, upon such terms and conditions, and subject to such requirements, as the Commission shall make, and to modify or revoke such permits and orders. (See Sections 9, 10, 11, 12, 13, 14, 18 and 19.)

And generally, the subject of the jurisdiction of the Commission, so far as hydraulic mining is concerned, is to examine, report, adopt plans, grant permits to mine by the hydraulic process to those who apply, and to modify or revoke such permits.

The jurisdiction exercised by said Commission under the 5th head (as above designated), viz: to grant a per-

mit to mine by the hydraulic process, is acquired, by the proprietor of a hydraulic mine filing with the Commission, a petition, in manner and form as provided by said Act. (Sec. 9): Such petition to be "accompanied "by an instrument, duly executed and acknowledged, "as required by the law of the said State," (California) "whereby the owner or owners of such mine or mines "surrenders to the United States the right and privilege "to regulate by law, as prescribed by this Act, or any "law that may hereafter be enacted, or by such rules "and regulations as may be prescribed by virtue thereof, "the manner and method in which the debris resulting "from the working of said mine or mines shall be re-"strained, and what amount shall be produced there-"from." (Sec. 10): The Commission shall publish a notice of the filing of such petition, for the time, and in the manner and form, prescribed in the Act, "fixing a "time previous to which all proofs are to be submitted."

By these proceedings, the California Debris Commission (in judicial language) obtains jurisdiction to hear and determine the right of the petitioner to a permit to mine by the hydraulic process.

"On or before the time so fixed" (in said published notice) "all parties interested, either as petitioners or "contestants, whether miners or agriculturists, may file "affidavits, plans and maps in support of their respec-"tive claims." "Pending publication" (of the above notice), "the Commission, or a committee thereof, shall "examine the mine and premises in such petition." (Sec. 12.)

But these permits, under the terms of the Act, are granted upon one of two conditions:

(a) If no impounding works have already been constructed, in case a majority of said Commission "concur "in a decision in favor of the petitioner," "the Com- "mission shall make an order directing * * * what "restraining or impounding works * * * shall be "built and maintained; how and of what material; "where to be located; * * * as will prevent injury "to the said navigable rivers, and the lands adjacent "thereto." (Sec. 13.)

"That petitioner * * * must present plans and "specifications of all works required to be built in pur- "suance of said order, for examination, correction and "approval by said Commission," and upon approval of the same, the impounding works shall be constructed under the supervision of the Commission. "Upon com- "pletion thereof" (that is, of the impounding works, according to the approved plans) when approved, after completion, by the Commission, "permission shall there- "upon be granted to the owner or owners of such mine "or mines, to commence mining operations, etc. (Sec. 14.)

(*b*) Or, the intending petitioner may first construct impounding works, and then petition the Commission for a permit to mine, and "if said Commission shall be "of the opinion that the restraining and other works "already constructed at the mine or mines shall be "sufficient to protect the navigable rivers of said sys- "tems and the work of said Commission, then the owner

" or owners may be permitted to commence operations." (Sec. 15.)

The only other provision, or rather word of the Act, to which we deem it necessary to call the attention of the Court, is the word "*must*," as it occurs in Section 9, with its context, as follows:

"Sec. 9. That the individual proprietor or proprie-
" tors, or in case of a corporation, its manager or agent
" appointed for that purpose, owning mining ground in
" the territory in the State of California mentioned in
" section three hereof, which it is desired to work by the
" hydraulic process, must file with said Commission a veri-
" fied petition, setting forth such facts as will comply
" with law and the rules prescribed by said Commission."

We have quoted thus in extenso from the Act of Congress and sought, with a degree of thoroughness, to analyze this Act of Congress, because by these means we hope to aid the Court in forming its conclusions as to the correct construction of the Act, so far as its provisions are involved in the true solution of the questions now involved in the case at bar.

One other consideration as basis for our discussion of the question.

The conditions at the time of the passage of the Act were as follows:

The U. S. Courts for this circuit had clearly and unmistakeably announced the power of the Court to protect the navigable waters of the State from injury to navigation, by injunction; and also the power of the Court, where the citizenship of the parties brought them within the jurisdiction of the Court, by injunction, to protect the

lands adjacent to the navigable streams from permanent and irreparable injury. by hydraulic mining.

The *nisi prius* courts, and Supreme Court of California, had clearly announced the right to protect, by injunction, lands in private ownership, from irreparable injury by hydraulic mining.

Hydraulic mining on the water-shed of the Sacramento River had not been all stopped. But all mines doing, or threatening irreparable injuries, had probably been stopped. But there were, and are, many mines so situated, or so operated, that their mining operations neither did nor threatened injury, and in the case of most of these mines, either no injunction had been sought against them, or upon a trial of the questions of fact involved, it had been judicially determined that their operations neither did nor threatened injury. Among the latter class was the very mines which it is sought to enjoing in the case at bar. This is a proper fact to argue on this demurrer; for it appears in the records of this Court; the case was elaborately tried in this Court, and resulted in a painstaking and elaborate opinion, in which it was judicially determined that the method of conducting its operations, and impounding, successfully protect from injury the navigable waters of the United States, and adjacent lands. And this in a suit by the United States against the same respondent, who is the respondent in the case at bar. The decision was rendered October 5, 1892, and is reported in the Federal Reporter, 53 vol., page 625.

Now, taking into consideration the large number of mines of the first class above, which, owing to their

situation, locality and natural surroundings, long have been, and long can be, operated, without doing or threatening any injury whatever to any one, and without any impounding works whatever (and notably in Plumas County), where impounding works are not necessary, and could not possibly serve any useful purpose; and then, reading the Act of Congress, which only authorizes the California Debris Commission to issue a permit when impounding works have been constructed and approved by the Commission, we have counsel for complainant contending that the Court should so construe this Act as that these mines, which neither do nor threaten injury, shall not be operated at all until their owners shall have constructed impounding works, which are not needed, and which could serve no useful purpose. Such construction would not only be absurd, but *would be contrary to natural right.*

What is the proper construction of the language of this Act of Congress?

This involves careful and correct judicial investigation.

We submit three propositions on this point, claiming:

First: That the act *permits* the owner of a hydraulic mine to apply for a permit to mine by the hydraulic process, and if he obtains the permit, in accordance with the terms of the Act, so long as he mines in accordance with the terms of the permit and the rules and orders of the Commission, he is protected fully from any hostile action by the U. S. Government; being so protected by the Act of Congress.

Second: That the Act does not compel a mine-owner

to apply for a permit, before he can mine by the hydraulic process; but if he so mines, without the permit, he will be subject to all proceedings, injunctions and penalties, and in the same courts, to which he would have been subject if this Act of Congress had never passed, and is also subject to the criminal prosecution and penalty, by virtue of this Act, provided in Section 22 of the Act, including fine and imprisonment, this penalty being applicable to the owner and employee.

Third: That no injunction will issue in any case, except to prevent threatened *injury*.

We do not contend, nor have we contended, that the Act is unconstitutional, but we do insist that the construction contended for by complainant's counsel would render the Act both unconstitutional and against natural right.

The *power of Congress* over the subject-matter of this legislation rests entirely upon the provision of the U. S. Constitution, and the Act admitting California into the Union.

The power of this Court in this case depends upon the Judiciary Act and the Caminetti Act.

The only provisions of the U. S. Constitution applicable are:

Sec. 8, of Art. I:

" The Congress shall have power * * *

" To regulate commerce with foreign nations, and " among the several States."

Amendment IX:

" The enumeration in the Constitution of certain rights

" shall not be construed to deny or disparage others " retained by the people."

Amendment X:

" The powers not delegated to the United States by " the Constitution, nor prohibited by it to the States, are " reserved to those States respectively, or to the people."

Section 10, of Article I:

The limitation of powers of the individual States contains nothing in any way applicable to this matter.

9 U. S. Statutes at Large, pp. 452-3, " An Act for the Admission of the State of California into the Union," provides:

" Sec. 3. That the said State of California is admit- " ted into the Union upon the express condition * * * " *That all of the navigable waters within the said State* " *shall be common highways*, and forever free, as well to " the inhabitants of said State as to the citizens of the " United States, without any tax, duty or impost there- " for."

This portion of the Act admitting California into the Union, above quoted, is copied from the Ordinance of the Old Congress for the government of the territory northwest of the Ohio River, passed July 13th, 1787, and in one way or another has been incorporated into the compacts admitting the different States (except the original 13) into the Union. We refer to this fact, because in nearly all of the decisions relating to the construction of the commerce and navigation clause of the National Constitution, this language has been referred to in the opinions. These compacts are binding, morally and

legally, between the various States and the nation, and express clearly the joint and several duty and obligation of the parties to those several compacts.

The Commerce and Navigation Clause of the Constitution.

Commerce is defined as "The exchange of goods, pro-"ductions, or property of any kind; especially exchange "on a large scale, as between States or nations."

See Standard Dictionary, Burrill's Law Dictionary, Rapalje and Lawrence's Law Dictionary.

Navigation is defined as "The act of navigating; the "moving over water in vessels."

Vide Standard Dictionary.

Mr. Burrill, in his Law Dictionary, gives the following definition:

"Navigation. The act of navigating or passing on "water in ships or other vessels.— *Webster.*

"The management of ships or vessels (citing 3 Kent's, "Com. 159.)

"Commerce or intercourse by means of shipping. "(Citing) Marshall, Chief Justice, 9 Wheaton's Reports, "189–196; the Passenger cases, 7 Howard's Reports, "283 *et seq.*"

The latest definition of commerce that we find by our Supreme Court (see Gloucester vs. Penn., 114 U. S. p. 196):

"Commerce with foreign nations and between the "States consists of the transportation of persons and "property between them."

By what degree of ingenuity it can be contended that

the floating of light particles of flocculent matter, or in other words roily water, in navigable streams, constitutes *commerce*, or is included within the terms "commerce" or "navigation," we have not been able to ascertain. We submit that it is entirely foreign to, and in no sense included within those terms. Its only true relation to the question involved is, as to whether or not it tends or threatens to obstruct commerce or navigation.

The Commerce and Navigation Clause of the Federal Constitution, and the navigable waters provision above quoted, contained in the Act admitting California, have been the subject of frequent judicial inquiry.

What are the respective rights, and jurisdiction of the General Government and the several States over the navigable waters, (and the lands underlying them), within the territorial limits of a State?

Upon this point we submit the following authorities:

1 Kent's Commentaries, p. 494.

After discussing *Gibbons* v. *Ogden*, which involved the right of New York State to grant to Livingston and Fulton (the latter the inventor, and the former the capitalist who introduced steam navigation,) the exclusive right to navigate the Hudson River (annulling the same;)

Also the Embargo Act (sustaining it;)

Also the question of the right of a State to require an importer to pay a tax on each package imported (annulling it;)

Also the right of Congress to control the action of a State in erecting or authorizing dams in navigable streams (affirming it;)

The learned author uses the following language (pp. 494–5):

"It has been held that if Congress, in the execution of "the power to regulate commerce, should pass a statute "controlling State legislation in erecting dams over small "navigable creeks, where the tide ebbs and flows, it "would be valid and binding. But until Congress had "actually exercised their power over the subject, the "State legislation was not considered in that case as re- "pugnant to the power in Congress in its *dormant* state "to regulate commerce. It is admitted, however, that "the grant to Congress to regulate commerce on the "navigable waters of the several States, contains no "cession of territory, or of public or private property; "and that the States may, by law, regulate the use of "fisheries and oyster beds, within their territorial limits, "though upon navigable waters, provided the free use of "the waters for navigation and commercial intercourse "be not interrupted."

18 Howard (U. S.), p. 71; (15 L. C. P. Co., p. 269); *Smith* v. *The State of Maryland.*

In this case a ship had been duly licensed for the coasting trade and fisheries by the U. S. The owner (Smith, the plaintiff,) being a resident of Pennsylvania, and the ship duly enrolled at Philadelphia, was seized and condemned in the Courts of Maryland, under a statute of that State, providing for such proceedings, in case of fishing for oysters with certain prohibited implements.

Inter alia, the Court said:

"In considering whether this law of Maryland belongs "to one or the other of these classes of laws (quarantine,

" etc.,) there are certain established principles to be kept " in view, which we deem decisive:

" Whatever soil below low-water mark is the subject " of exclusive propriety and ownership, belongs to the " State, and on whose maritime border, and within " whose territory it lies, subject to any lawful grants of " that soil by the State, or the sovereign power which " governed its territory before the Declaration of Inde- " pendence." (Authorities.)

" The State holds the propriety of this soil for the con- " servation of the public rights of fishery thereon, and " may regulate the modes of that enjoyment so as to pre- " vent the destruction of the fishery. In other words, it " may forbid all such acts as would render the public " right less valuable, or destroy it altogether. This power " results from the ownership of the soil, from the legisla- " tive jurisdiction of the State over it, and from its duty " to preserve unimpaired those public uses for which the " soil is held. * * *

" The law now in question is of this character."

4 Otto, 391. *McCready* v. *Virginia*, (24 L. C. P. Co., p. 248).

Each State owns the tide-waters and beds of all tide-waters within its jurisdiction. Subject to the paramount right of navigation, fisheries remain under the exclusive control of the State.

" The principle has long been settled in this Court, " that each State owns the bed of all tide-waters within " its jurisdiction, unless they have been granted away. " (Authorities.) In like manner the States own the tide- " waters themselves, and the fish in them, so far as they

"are capable of ownership while running. For this "purpose the State represents its people, and the owner- "ship is that of the people in their united sovereignty."

"A State can grant to its own citizens the exclusive "use of lands covered by water, for raising oysters, and "may prohibit, under a penalty, their use for such pur- "poses by citizens of other States." * * *

"Neither do we think this case is at all affected by "the clause of the Constitution which confers on Con- "gress power to regulate commerce."

2 Otto, 542. *U. S.* v. *Cruikshank*, (23 L. C. P Co., p. 589).

Every republican government is in duty bound to protect all its citizens in the enjoyment of an equality of right.

There is not in the Act anywhere any attempt to prohibit or inhibit, or punish any hydraulic mining, except such as does, or threatens injury to the navigability of the streams or the lands adjacent thereto. If an Act is to be construed according to its language, where is the language in this Act requiring or authorizing an injunction of an hydraulic mine which neither does nor threatens injury?

In the Circuit Court, counsel for complainant contended that "Congress, under its commercial powers, *can control the navigable waters* of the Sacramento River and its tributaries."

We submit, the correct statement is, that Congress can control commerce and navigation on the navigable portions of the Sacramento River and its tributaries, which

we submit is a very different proposition. Congress also has power to prevent the obstruction of navigable streams, or interference with interstate or foreign commerce.

Jurisdiction in a court, is the right to decide an issue right or wrong. Jurisdiction to pass a law on a given subject, is the right to pass a good law, or an evil one. But it is not, as contended for by complainant, the arbitrary right to pass any kind of a law, and make it valid; for if such law be unconstitutional, or against natural right, the courts will declare it invalid. If a Democratic Congress should pass a law that the holding of Republican political meetings in San Francisco constituted an obstruction to the navigation of the Sacramento River, we submit that there can be no question as to what the courts would decide as to its validity. And yet it is contended in this case by complainant's counsel that Congress can arbitrarily determine what is, and what is not an injury to the navigable waters. The true and established rule with regard to legislative power is, that the power to legislate concerning a subject, being granted, the power may be exercised within constitutional limitations, but not against natural right.

The cases, *Gloucester Ferry Co.* v. *Penn*, and *Mobile Co.* v. *Kimball* (cited and quoted by counsel below) have no pertinency; the former decided, substantially, that the States have no power to tax interstate commerce; and the latter decides that a State may lawfully expend money in the improvement of navigable water-ways within its limits, provided such improvements are not prohibited by Congress.

Congress has (in the Act under consideration) decided

what constitutes an injury, or violation of the national rights, in unmis'akable terms, where it says, in Sec ion 22: "And any persons, etc., who shall mine by the hydraulic process, directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this Act, shall be guilty, etc., and punished," etc.

Will a law be construed to inderdict the pursuit of a legitimate productive industry in an entirely harmless manner, unless such law in plain terms, interdicts, or prohibits it? Can a court inject language into the belly of an Act of Congress to sustain a contention that a legitima'e industry, pursued in an innocuous manner, should be enjoined?

The Court will observe, that all through the Act of Congress involved, the only thing in any manner interdicted or prohibited is hydraulic mining injuring or threatening to injure the navigable streams or lands adjacent thereto; but in this statement we do not overlook the use of the word "must" in Section 9 of the Act, where it is provided that one desiring "to work by the hydraulic process must file with said Commission a verified petition," etc., and in section 10, that "said petition shall be accompanied by an instrument * * * whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the work-

ing of said mine or mines shall be restrained, and what amount shall be produced therefrom."

At the argument in the court below, complainant's counsel laid stress upon the use of this word "must" in said section 9.

"MAY" AND "MUST."

"May" and "must," judicially, are often construed interchangeably; and we contend that under the terms of this Act, and in order to make the same a constitutional act, that the word "must" is to be construed "may," and that this can be done with propriety, and is the proper construction of the word in this act.

MUST.

We contend for no forced or unusual construction of the word must in Section 9 of the Act.

To illustrate, if a State statute provided that one desiring to obtain a judgment of a certain character, "must file a complaint," the word would be more appropriate than "may file a complaint." So, in the statute under consideration, one desiring a permit, must file a petition. But, in construing an Act, as in construing a contract, the instrument must be taken by its four corners, and all of its terms and provisions considered and construed together.

The authorities to sustain our contention are quite numerous, and have been the subject of approval by text writers of reputation, especially in works and articles upon Statutory Construction. We cite the following:

Jenkins v. *Putnam*, 12 Northeastern Reporter, p. 613 (N. Y. Court of Appeals, June 28, 1887);
Spears v. *Mayor of New York*, 72 N. Y. 442;
Wallace v. *Feeley*, 61 Howard, p. 225, and
Wallace v. *Feeley*, 88 N. Y., 646.
Merrill v. *Shaw*, 5 Minn., p. 148.

In all of these cases the word "must," in the different stautes under consideration, was construed as permissive, and not imperative.

It is even recognized and stated by the Law Dictionaries.

See Rapalje & Lawrence's Law Dictionary, "Must."

Endlich on the Interpretation of Statutes, p. 428, Sec. 312, in discussing this subject, of when permissive words in a statute are to be construed as mandatory, and when mandatory words are to be construed as permissive, uses the following language: "But as will hereafter appear, "it is even reasonable to suppose that in using language "mandatory in its strict grammatical sense, it attached to "it the meaning and effect of permissive words only."

See also Sec. 316 of same work; and
Fowler v. *Pirkins*, 77 Ill., 271;
Wheeler v. *Chicago*, 24 Ill., 105;
R. R. Co. v. *Hecht*, 95 U. S., 168, 170.

It is the old question of mandatory or declaratory, imperative or permissive, which so often arises in the construction of statutes, which in the main are decided upon the basis of presumption. The intention of the Legislature, being the subject of the presumption, and in

general depending upon the same rules that are applied as between strict construction (tending to limit the application) and liberal construction (tending to extend the application) of the statute. They are the rules applicable as between two possible constructions. We state them.

1. "All statutes which encroach on personal or property rights of the individual are to be construed strictly."

2. "Statutes which prescribe the manner in which persons shall use their private property, or restrict and regulate the disposition thereof, are against common right, and must be construed strictly."

3. "Statutes passed in the exercise of the police power of the State, restricting and regulating property rights, *or the pursuit of useful occupations and callings*, are to be construed strictly."

We do not cite authorities upon these rules, because we deem it unnecessary. We have copied them from pp. 383–6, Vol. 23, Am. & Eng. Encyclopedia of Law, where whole pages of authorities are given in the notes.

We have thus shown, as we contend, that the same word may be construed as either permissive or imperative, according to the circumstances, the context, and the rules of construction.

As between two possible constructions, that construction will be adopted which renders the Act constitutional, not against natural right, and not destructive of property rights. (This subject will be further discussed with authorities, later in this brief.)

But suppose that there had actually been inserted in

the Caminetti Act, at the end of Section 10, in words: "Each and every person mining by the hydraulic process within the territory drained by the Sacramento River, without having first obtained a permit so to do from the California Debris Commission, shall be enjoined by the United States Courts at suit of the United States, even though such hydraulic mining neither does nor threatens injury."

Then what? Then, we contend, the United States would not be entitled to an injunction, when there was no injury done or threatened.

And our contention is sustained by authority; by judicial decision so clear and strong, so rich in the statement of the fundamental principles of our form of constitutional government, that there is no escape from either its reasoning, deductions, or conclusions. We quote in extenso from the case below.

It was urged at the argument, by Mr. Devlin, that if the North Bloomfield Gravel Mining Co. were not enjoined, that other mining companies, which might do injury, would thereby be encouraged to carry on mining operations; the intendment, doubtless, being that owing to the high character and standing of the President, Secretary, and members of the Board of Directors of the North Bloomfield Gravel Mining Company, that its example would be followed by others, less scrupulous to observe the law of the land and the rights of others. This proposition is also fully answered by the same case (if it requires answer).

The case referred to is *City of Janesville et al.* v. *Car-*

penter, 77 Wisconsin, p. 288, also reported in 46 Northwestern Rep., p. 128.

Syllabus: "1. In a suit by a city for an injunction to "restrain defendant from driving piles into the bed of a "river (the same being there navigable in fact, and by "legislative enactment declared so to be), and erecting a "building thereon, the petition states no cause of action "where it merely alleges that the effect of defendant's ex-"ample in erecting such building will be that others will "do likewise, to the injury of complainant in respect to "the public health, equal taxation, and liability to fire and "flood.

"2. Nor does it state any cause of action in favor of "a private corporation, that makes use of water-power "furnished by the river, where it alleges that such build-"ing will obstruct the flow of the water, and cause it to "back up to the place where the water is discharged from "complainant's water-wheels 'to some extent,' but fails "to allege any injury on account of it.

"3. The fact that the erection of a building is pro-"hibited by an ordinance of a city is no ground for an "injunction against it.

"4. Laws Wisconsin, 1887, c. 423, provides that 'it "shall be unlawful and presumptively injurious * * * "to person and property to drive piles,' etc., 'in Rock "River, within the limits of the County of Rock; and "the doing of any such act shall be enjoined at the suit "of any resident taxpayer, without proof that any injury "* * * has been or will be sustained by reason of "such act;' and, further, that it may be enjoined at the "suit of any one having the use of the water-power of

" the river in said county without other proof than that " the act will cause the river to 'rise or set back to some " extent at the place, where the water used to operate " his mill or factory is discharged into the river.' *Held*, " that the act is void, as it deprives riparian owners of " their property in the river without compensation, and " without due process of law.

" 6. In the enactment of such statute the Legislature " usurped the judicial power, by declaring an act unlaw- " ful, and commanding the courts to enjoin it, without proof " that any injury has been caused by it, and violated " Const. Wis., Art. 7, Sec. 2, which provides that the " judicial power of the State shall be vested in the " various courts.

" 7. Such statute is discriminating and class legisla- " tion, and as such is contrary to the spirit of the federal " and State Constitutions, and to the principles of civil " liberty and natural justice."

Opinion: The complaint charged the threatened construction by the defendant of a building supported by numerous piles driven into the bed of the river, without the permission of, or an order from, the common Council of said city, such permission being required by an ordinance of said city, and that defendant had commenced the driving of such piles in the bed of said river for such purpose. That the said river is Rock River, and that said river is navigable in said place. That the consequences of permitting the defendant to so erect said building as affecting the interests of the City of Janesville, will be that others will soon erect buildings fronting on said bridges, and sup-

ported in like manner, until the whole space over said river, on both sides of said bridges, is occupied by similar buildings fronting on said bridges, and extending up and down said river a distance of about 100 feet from the sides of said bridges; and by reason thereof the flow of the water in said river will be further permanently obstructed, and the interests of said city and its inhabitants greatly prejudiced and injured by obstruction to the circulation of air, and in respect to the dangers of fire and flood, and to the public health, and as respects equality in the matter of taxation and assessments and the benefits thereof, and that said building will be in violation of an ordinance of said city against erecting any buildings in said river. * * * That Rock River is a public highway, and has been returned as navigable, and has been meandered. That the width of the river has already been diminished one-third, and the waters have been set back as far as the dam, and that said bridges have obstructed the flow of the river to a considerable extent, and that the abutments and piling thereof in the bed of the river, and the filling in of earth and other materials, and placing the foundations, walls and piers for the support of the building, and the throwing in of ashes and other materials in the bed of the river, have greatly obstructed the river between said bridges and other localities, and that there is danger that other buildings and obstructions will be placed in the river by the example of the defendant. * * * The defendant answered, amongst other things, that the river is navigable, in fact, that the bridges are old and dilapidated. Denies all the speculative and predicted conse-

quences which the complaint alleges, and some other immaterial allegations, and admitting the other allegations of the bill of complaint. Affidavits were introduced, showing that the injuries resulting from the construction of the building would be slight. The Court says, after stating the facts:

"What effect, if any, this proposed building, by its "example, may have in any such direction, so as to in- "jure any private or public interest, is left to mere pre- "diction and conjecture. The action does not involve "any question of obstruction or injury to navigation, or "of injury to any public right. * * * The com- "plaint does not show that the proposed building would "be a private or a public nuisance." (The lower court granted the injunction.) * * * "It is not alleged "that the public will suffer by this one building at all, "but by a row of buildings which somebody might erect "in following the example of the defendant. * * * "It is only when such similar buildings erected by "others fill that whole space that it is claimed in the "complaint that the dangers," etc., "will even arise or "occur." The only injury to these interests that is "alleged is from what somebody else may do in the "future, through the influence of the defendant's ex- "ample. * * * This is a most remarkable case, and "there has never been anything like it. It is not "charged that the proposed building will in itself do any "harm in any respect whatever, * * * but that it "may possibly be followed by an example by others in "building buildings which may possibly do harm. It "would be a new case where one had actually done

" something in itself right and harmless, and he should " be sued, because others had done something wrong " and injurious by following his example, and it would " be a strange case to enjoin one from doing some- " thing wrong and injurious, by following his ex- " ample. * * * As to the other plaintiff, it is " not even inferentially stated that it would be any " injury at all to it. * * * Should a court " of chancery enjoin the defendant from erecting his " building on his own land, on such an allegation as " this? We think the learned counsel of the appell- " ant is right in claiming that the complaint does " not charge facts sufficient to state any cause of action " known to the general laws of the land and the practice " of courts, in favor of either plaintiffs. * * * But, " even if the complaint sufficiently charged that the con- " sequences predicted would be produced by the proposed " building, the city of Janesville has no such corporate " interest in them as would authorize it to maintain such " an action." (Authorities.) " But it is sufficient that " no wrong, injury or damage is charged. * * * As " a private nuisance or a public nuisance, by which some " private person has suffered by special and peculiar " injury, there must be material annoyance, inconveni- " ence, discomfort or hurt, and the violation of another's " rights in an essential degree." (Citing Wood on Nuisances, 1, 3, 4.) " The law gives protection only against " substantial injury, and the injury must be tangible, or " the comfort, enjoyment or use must be materially im- " paired." (Authorities.) " It is a maxim of the law " that wrong without damage, or damage without wrong,

" does not constitute a cause of private action. It is " charged that this building will be in violation of an " ordinance of said city. That would not give a cause of " action for an injunction, even if the ordinance so pro- " vided." (Authorities.) * * *

" The learned counsel of the respondent cites chapter " 423, Laws 1887, in support of the action. * * * " The first section is as follows: 'It shall be unlawful " and presumptively injurious and dangerous to persons " and property to drive piles, build piers, cribs, or other " structures, * * * in Rock River, within the limits of " the County of Rock, and the doing of any such act " shall be enjoined at the suit of any resident taxpayer, " without proof that any injury or danger has been or " will be caused by reason of such act.' * * * 'Sec. 2. " The doing of any such act shall also be enjoined at the " suit of any owner or lessee of the right to use water " of said river to operate any mill or factory within said " county, without proof of any further fact than that " such act will cause the water of said river to rise or set " back, to some extent, at the place where the water " used to operate such mill or factory, is discharged into " said river.' * * *

" The learned counsel of the appellant contends that " this Act is unconstitutional, and therefore void. The " Legislature would have saved time and expense if " it had issued the injunction in the case for which the " Act was made. This is the first time that any Legis- " lature of any enlightened country ever attempted to " create an action without a cause of action, to authorize a " complaint to be made to a court when there is nothing

" to complain of; to compel the courts to enjoin the law-
" ful use and enjoyment of one's own property 'without
" proof that any injury or danger has been or will be
" caused by reason of such Act,' to create a cause of ac-
" tion without wrong, injury, or damage; to authorize an
" action to be brought by a person without any interest
" in the subject matter; * * * to make that act unlaw-
" ful and actionable in one county and as to one river
" that is lawful in all other counties and as to all other
" rivers, under precisely the same circumstances"; (the same thing in principal is attempted in the Act under consideration) "or to adjudicate and decide the case, and
" then order and compel the Court to execute its judg-
" ment by issuing an injunction. These are some of the
" strange and novel propositions of this statute. That
" Thomas Lappin, the owner in fee of this ground, has
" the right to use and enjoy it to the center of the river,
" in any manner not injurious to others, and subject to
" the public right of navigation, has been too often de-
" cided by this Court and other courts to be questioned.
" As a riparian owner of the land adjacent to the water,
" he owns the bed of the river *usque ad filum aquae*, sub-
" ject to the public easement, if it be navigable in fact,
" and with due regard to the rights of other riparian
" proprietors. He may construct docks, landing places,
" piers and wharves out to navigable waters, if the river
" is navigable in fact, and if not so navigable, he may
" construct anything he pleases to the thread of the
" stream, unless it injures some other riparian proprietor,
" or those having the superior right to use the waters
" for hydraulic purposes." (Authorities.) "Subject to

" these restrictions, he has the right to use his land un-
" der water the same as above water. It is his private
" property under the protection of the Constitution, and
" it cannot be taken, or its value lessened or impaired,
" even for public use, without compensation, or without
" due process of law, and it cannot be taken at all for any
" one's private use.

" This statute makes it unlawful for the defendant who
" owns this ground " (as the respondent in the case at bar owns its land under United States patent, as alleged in the answer), " and has the right to use it under said Lap-
" pin, to drive piles into it anywhere within the river for
" any purpose. It prevents the lawful use of his prop-
" erty. It takes away from him, without compensation
" or due process of law, and denies the defendant the
" equal protection of the laws. It is, therefore, in direct
" violation of Articles V and XIV of the Amendments of
" the Constitution of the United States, and of Section
" 13 of Article I of the State Constitution, and is, there-
" fore, void. * * * Any restriction or interruption
" of the common and necessary use of property that de-
" stroys its value, or strips it of its attributes, or to say
" that the owner shall not use his property as he pleases,
" takes it in violation of the Constitution," (citing *Pum-
" pelly* v. *Green Bay Co.*, 13 Wall. 166; *Wynenamer* v.
" *People*, 13 N. Y. 378; *People* v. *Otis*, 90 N. Y. 48
" *Hutton* v. *City of Camden*, 39 N. J. Law, 122).

" The Legislature usurped the judicial power of the
" courts by the enactment of this statute. It adjudicates
" an act unlawful and presumptively injurious and dan-
" gerous, which is not, and cannot, be made so without a

" violation of the constitutional rights of the defendant, " and imperatively commands the court to enjoin it with- " out any proof that any injury or danger has been, or " will be, caused by it. * * * It violates Section 2 " of Article VII of the State Constitution, which pro- " vides that the judicial power of the State, both as to " matters of law and equity, shall be vested in the various " courts. It takes away the jurisdiction of the courts to " inquire into the facts and determine the necessity and " propriety of granting or refusing an injunction in such " a case, according to the established rules of a court of " equity. (Ervine's Appeal, 16 Pa. State, 256.) It is " said in that case: 'That is not legislation which adju- " dicates in a particular case, prescribes the rule, con- " trary to the general law, and orders it to be enforced. " Such power assimilates itself more closely to despotic " rule than to any other attribute of government.'

" 3. This statute is discriminating and class legisla- " tion, in violation of the spirit of our Constitution, and " contrary to the principles of civil liberty and natural " justice. It gives to a certain class of citizens privi- " leges and advantages which are denied to all others in " the State, under like circumstances, and subjects one " class to losses, damages, suits, or actions from which all " others, under like circumstances are exempted. (*Holden* v. *James*, 11 Mass. 396.) Its operation is restricted and " partial to that part of Rock River within the County " of Rock, while said river elsewhere and all other rivers " are excluded. * * * It gives to such favored classes " the stupendous advantage and exceptional privilege of " maintaining such actions without proof that any injury

" or danger has been, or will be, caused by reason of " such act. It would be difficult, if not impossible, to " to crowd into so short a statute any more or greater " violations of that principle, so essential to a free gov- " ernment of equal, general and standing laws. For " these reasons, this statute is unconstitutional and void. " It is, perhaps, not a violation of any special clause of " the Constitution in these respects, but it is a violation " of its essential spirit, purpose and intent, and contrary " to public justice." (Authorities.) " In this connec- " tion I cannot forbear quoting the language of Mr. " Justice Chase in *Calder* v. *Bull*, 3 Dall. 387–8: 'I can- " not subscribe to the omnipotence of a State Legislature, " or that it is absolute and without control, although its au- " thority should not be expressly restrained by the Con- " stitution or fundamental law of the State. The nature " and ends of the legislative power will limit the exercise " of it. There are certain vital principles in our free " republican government which will determine and over- " rule an apparent and flagrant abuse of legislative " power, as to authorize manifest injustice by positive " law, or to take away that security of personal liberty " or private property for the protection whereof the gov- " ernment was established. An Act of the Legislature " (for I cannot call it law), contrary to the first great " principles of the social compact, cannot be considered " a rightful exercise of legislature authority." "This " language is quoted in the above case of *Durky* v. *The* " *City of Janesville*, but it will bear repetition here, as " more apt and appropriate in that case. It has been " suggested that this statute was procured for this case

" and perhaps, like cases in the City of Janesville, as if, " when the courts deny an injunction, the Legislature " is made to intervene and enact that an injunction shall " be granted, and that, too, without proof of injury or " danger. It is hard to believe that any one would pro- " cure the passage of such an Act or any Act of the " Legislature to circumvent and overrule the courts in " cases which have failed for want of any proof of in- " jury. This Act is sought to be sustained as a proper " exercise of the police power of the State. The Act " itself makes no such claim, and has not the remotest " reference to any such object or purpose. It is suffi- " cient to say that such an objectionable statute cannot " be sustained by the exercise of any power inherent in " or conferred upon the Legislature. The complaint " states no cause of action, and therefore the Circuit " Court ought to have sustained the motion to dissolve " the injunction."

The clause of this opinion which recites that this statute may have been passed because the courts had already denied an injunction in the same cases, because no injury could be shown, is remarkably pertinent in the case at bar, in which the respondent has pleaded a former judgment, determining in the same court, between the same parties, that the respondent's methods of mining neither do, nor threaten injury, and that its mining operations are still carried on in the same manner that they were being carried on at the times involved in the former suit between the same parties.

We do not ask that the Act as an Act be declared

unconstitutional, because if correctly interpreted, we believe it to be constitutional.

But we ask that a rule of construction be applied to it, that, as between two possible constructions, the courts will give that interpretation which renders a statute constitutional as against an interpretation that would render it unconstitutional. That it will give an interpretation which does not overthrow recognized property rights, that is not against natural right, and that is not destructive of the fundamental principles of free, equal and enlightened civil government.

We contend that the construction contended for by complainant would be in direct conflict with these rules, and that the construction contended for by us would be in harmony with them.

In the Circuit Court, counsel for the complainant presented certain authorities to support their contention that the Caminetti Act justifies an injunction without injury. We submit a brief statement of the questions involved in those cases, asking the Court to bear in mind that our contention is, that said Act nowhere seeks to interfere with, nor could lawfully interfere with, mining, except so far as the same injures or threatens to injure the navigation or navigability of the navigable waters.

The cases, *Gloucester Ferry Co.* v. *Penn*, and *Mobile Co.* v. *Kimball* (cited and quoted from in complainant's brief) have no pertinency; the former decided, substantially, that the States have no power to tax interstate commerce; and the latter decides that a State may lawfully expend money in the improvement of navigable

water-ways within its limits, provided such improvements are not prohibited by Congress.

If counsel's contention is correct, then we reply that Congress has (in the Act under consideration) decided what constitutes an injury, or violation of the national rights, in unmistakable terms, where it says, in Section 22: "And any persons, etc., who shall mine by the hydraulic process, directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this Act, shall be guilty, etc., and punished," etc.

Will a law be construed to interdict the pursuit of a legitimate productive industry in an entirely harmless manner, unless such law in plain terms, interdicts, or prohibits it? Can a court inject language into the belly of an Act of Congress to sustain a contention that a legitimate industry, pursued in an innocuous manner, should be enjoined?

We feel compelled to challenge the contention of complainant's counsel that, under the River and Harbor Bill of 1890, "power is given the Secretary of War "to absolutely determine what contemplated improve- "ments, or structures, over these waters are, or are not, "obstructions to said waters."

What the Act really does, is to provide that no bridges shall be constructed over navigable waters, or structures extended into navigable waters outside of established harbor lines, without the approval of the Secretary of War.

The power to determine "what may be constructed" is a very different thing from the power to determine "what

constitutes an obstruction." The former is an executive act, the latter a judicial determination.

The case of *Newport and Cincinnati Bridge Co.* v. *U. S.*, 15 Otto, p. 470, decides but two important propositions.

Before Congress had passed any general law with regard to bridges across navigable waters (in other words, whilst that power of Congress was in a dormant state), under authority from the State Legislatures of Ohio and Kentucky, the Bridge Co. built a bridge across the Ohio River. There was a special statute of the U. S., granting the right to build a bridge, with a clear space for vessels of certain height and width. Congress also passed a resolution authorizing the bridge. Before the bridge was completed Congress passed another Act, that the clear space should be 100 feet high and 100 feet wider, and authorizing the Bridge Company to sue in the Court of Claims to have it determined what, if any, liability there was on the part of the U. S. to pay for the effect of the change in the law. The Court decided that the action of the States could not control or restrict the action of Congress; that the former right was a mere license, revocable by Congress, and that the U. S. had incurred no liability by the change in the law. That, as the bridge was a bridge over a navigable stream, solely for the purpose of interstate commerce, Congress had entire jurisdiction as to the bridge, whenever it chose to exercise it. Judge Field dissented, thinking the doctrine too harsh.

In *Penn* v. *Wheeling & Belmont Bridge Co.*, 18 Howard, 421, a bridge built without any authority from Con-

gress had been decreed by the U. S. Court to be an obstruction to commerce. Thereafter Congress passed an Act authorizing the maintenance of the bridge, and making it a Postroad (it was an interstate bridge between Ohio and Virginia) for the passage of U. S. mails. The Court held that thereby the bridge became a lawful structure. In other words, that Congress has power to authorize obstructions of a navigable stream.

But in this opinion occurs the following language, very significant in the case at bar (see pp. 431–2): "A class of "cases that have frequently occurred in the State courts "contain principals analogous to those involved in the "present case. The purely internal streams of a State" (as is the Sacramento River) "which are navigable, be- "long to the riparian owners to the thread of the stream, "and, as such, they have a right to use the waters and "bed beneath for their own private emolument, subject "only to the public right of navigation. They may con- "struct wharves or dams or canals, for the purpose of "subjecting the stream to the various uses to which it "may be applied, *subject to this public easement.* But if "these structures materially interfere with the public "right, the obstruction may be removed or abated as a "public nuisance."

The cases cited on behalf of complainant where three different States had passed laws regulating the floating, running and booming of logs in their respective navigable streams, require but brief notice. Every one at all familiar with the floating, running and booming of logs in rapid streams, cannot fail to know how dangerous it is to shipping, especially to the smaller water craft, when

the logs are not properly managed, handled and controlled. Under such circumstances, they become even more serious than a mere obstruction to navigation.

The Pennsylvania case was upon a State statute, which provided (see 65 Pa. State, p. 402): "Sec. 2. It shall "not be lawful for any person * * * to float * * * "down the Susquehanna River, between the town of "Northumberland and the line of the State of Mary- "land, any saw-logs, without the same being rafted and "joined together or enclosed in boats, and under the "control, supervision and pilotage of men, especially "placed in charge of the same and actually thereon."

To any one who has seen log drives, and who is familiar with the current and channels of that portion of the beautiful and picturesque Susquehanna, involved in this legislation, and the vast number of small craft plying upon it constantly, when it is open to navigation, this legislation and its propriety, merely as a police measure, cannot fail to sufficiently appeal.

In *Texarcana & Fort Scott Ry. Co.* v. *Parsons*, 74 Fed. Rep., p. 408, Parsons sued the Railway Co. to recover damages for his shipping on Red River, being prevented from passing up and down Red River at the place where the Railway Co.'s bridge crosses Red River from Arkansas to Texas, such detention being caused by driftwood lodging against the bridge. This bridge was constructed after the passage of the Act of Congress of May 1, 1888, (25 Stats. at Large, 105–7), which was the first General Statute of Congress with regard to the construction of bridges over navigable streams. The only defense offered was that the bridge

was not a legal cause for action for damages, claiming it had been built in compliance with the Act of Congress. The trial showed that the bridge did not comply with the Act of Congress; that the spans were narrower, and lower than the Act required; that the piers in the stream were not in line with the course of the stream, that the bridge was not at right angles to the course of the stream, and that the variance from the requirements of the Act had never been approved by the Secretary of War.

Opinion: "The rules of law applicable to this case are "well settled. Every citizen has a right to the free "navigation of the public waters of the United States; "any interruption or obstruction of this free use by any "kind of structure, is *prima facie*, a nuisance. But the "power of Congress to regulate commerce among the "States comprehends the control, *for that purpose, and* "*to the extent necessary*, of all the navigable waters of "the United States, and the railroads engaged in inter-"state commerce. Interstate commerce by rail has "grown to be more extensive and important than "that carried on upon the navigable rivers of the coun-"try. To promote and facilitate the commerce by rail, "which has to cross navigable streams, it has become "common for Congress to authorize the construction "of bridges over the navigable rivers of the United "States. Congress has the power to determine the loca-"tion, plan, and mode of construction of such bridges; "and a bridge constructed over a navigable river in ac-"cordance with the requirements of the Act of Con-"gress is a lawful structure, however much it may inter-

" fere with the public right of navigation." (Authorities.)

" It is equally well settled by the authorities we have " cited, that those who seek to justify the erection or " maintenance of a bridge across a navigable river, which " obstructs its navigation, upon the ground that Congress " authorized its erection and maintenance, must show " that it was constructed and is maintained in accordance " with the requirements of the Act of Congress." Then the Court, after stating the variance between the bridge as constructed and as required by the law, says: " The " bridge varies in its construction in a material respect " from the requirements of the Act of Congress, and is " therefore an unauthorized and unlawful structure. The " variation is material and substantial, and robs the " structure of the protection of the statute."

* * * " The only question was whether the bridge, " taken as a whole, was the proximate cause of stopping " the plaintiff's boats. The defendant did not contend " that the bridge was not an obstruction to the navigation " of the river, but only that Congress had authorized the " obstruction. This would have been a complete defense " if proved; but it was not proved, and no evidence was " offered tending to prove it.

" On the subject of damages, the Court told the jury " that, if they found the defendant responsible for the " detention of the boat, 'the plaintiff would be entitled " to recover his actual damages.' "

We can hardly see how an action at law for actual damages, is authority for the contention that an injunc-

tion should be issued in a case where there is no injury, actual or threatened.

In the case of *Vanderhurst* v. *Tholcke* (113 Cal. Sup. Ct., p. 147), the facts were: That in Salinas City, there were growing in a public street (the title to which in fee was vested in the City of Salinas) certain shade trees. That the City Council, in the exercise of its supervision of the streets, passed an order to cut down and remove the trees which were growing in said street in front of plaintiff Vanderhurst's premises. Vanderhurst sued out a writ of injunction, which the Supreme Court of California dissolved, on the ground that, under the charter of the city, they were clearly acting within their powers and duties.

Point II.

That in no case will a court enjoin the conduct of a lawful business, so long as the same is so conducted as neither to do nor threaten any injury whatever.

Bearing in mind that in this case the pleadings show that the respondent's operations neither do nor threaten any injury to navigation or any navigable waters, or to any lands adjacent to any navigable waters, we submit: that injunction is a special equitable relief, granted only to prevent injuries, actual or threatened; and that beyond this, courts of equity have never gone, and on principle never ought to go; that the courts have uniformly held to these doctrines, with the added requirement, that to justify the injunction, such injuries must be irreparable.

1st High on Injunctions, Sec. 20, (2d edition):

"The subject matter of the jurisdiction of equity "being the protection of private property and of civil "rights, courts of equity will not interfere for the pun- "ishment or prevention of merely criminal or immoral "acts, unconnected with violations of private right. "Equity has no jurisdiction to restrain the commission of "crimes, or to enforce moral obligations and the perform- "ance of moral duties; *nor will it interfere for the pre- "vention of an illegal act, merely because it is illegal;* and "in the absence of any injury to property rights, it will "not lend its aid by injunction, to restrain the violation "of public or penal statutes, or the commission of "immoral and illegal acts."

Same, Section 760:

"The unauthorized erection of a pier in a public har- "bor is a purpresture which will be restrained by "injuction at the suit of the Attorney-General. And "such an erection will be regarded as a nuisance *per se*, "and will be enjoined without evidence to show that it "would, if erected, be a nuisance in fact. So the ob- "struction of a navigable river, by a wharf-owner driv- "ing piles into the bed of a river and extending his "wharf so as to occupy a space of three feet, out of a "width of sixty feet available for navigation may be "enjoined. But where it clearly appears that the "erection of a pier or wharf in tidal waters, and upon "soil thereunder, belonging to the State, would not "constitute a public nuisance, and would not prove "injurious to the harbor or to the people of the State, an "injunction should not be allowed. Where, however,

" the structure proposed would hinder navigation, it " will not avail defendant to urge that the benefit to the " public counterbalances the inconvenience. But to " warrant an injunction against an alleged purpresture " or public nuisance it must clearly appear that it is " such in fact; and if it be doubtful whether there is a " purpresture the relief will be withheld. It is held " that in cases of doubt the question as to the existence " of the nuisance should be determined by a jury before " granting the injunction. But any unauthorized appro- " priation of public property to private uses, amounting " to a purpresture or public nuisance, is within the juris- " diction of equity to enjoin."

Perhaps there is no clearer statement of the matter anywhere than in the opening paragraph of Kerr on Injunctions, p. 1:

" The jurisdiction of the high court of justice, by way " of injunction, is an equitable jurisdiction, and is ex- " ercised upon equitable principles. The subject mat- " ter of the jurisdiction of a court of equity is civil " property. A court of equity is conversant only with " questions of property and the maintenance of civil " rights. *Injury to property, whether actual or prospec-* " *tive, is the foundation on which its jurisdiction rests.* " A court of equity has no jurisdiction in matters merely " criminal, or merely immoral, which do not affect any " right to property. If a charge be of a criminal nature, " or an offence against the public peace, and does not " touch the enjoyment of property, jurisdiction cannot " be entertained. The court has no jurisdiction to re- " strain or prevent crime, or to enforce the performance

" of a moral duty, except so far as the same is concerned " with rights to property. * * * An injunction, " therefore, cannot be had to restrain the publication of " libel, or proceedings in a criminal matter. But if an " act which is criminal touches also the enjoyment of " property, the court has jurisdiction, *but its interference " is founded solely upon the ground of injury to prop- " erty.*"

In *Truly* v. *Manzer*, 5 Howard (U. S.) p. 142–3, the U. S. Supreme Court says: " There is no power, the " exercise of which is more delicate, which requires " greater caution, deliberation and sound discretion, or " more dangerous in a doubtful case, than the issuing of " an injunction. It is the strong arm of equity, that " never ought to be extended, unless to cases of great in- " jury, where courts of law cannot afford an adequate " and commensurate remedy in damages. The right " must be clear, the injury impending and threatened so " as to be averted only by the protecting, preventive " process of injunction."

2 Black (U. S.), p. 545; *Parker* v. *Winne- pesseagu, etc.*

" If the evidence of injury is conflicting, so that the " injury is doubtful, injunction will not be granted."

The public cannot obtain an injunction for a private injury, and a private individual cannot obtain an injunction for a public injury, unless the complainant sustains special injury.

If the prayer of the bill in this action is to be taken as indicative of the theory upon which the bill was framed, it was contended by the complainant, The United States, that an injunction of this Court would lie against the defendant, to prevent its hydraulic mining operations in the district covered by the Caminetti Act, merely for the failure of the said defendant corporation to obtain the permit of the Debris Committee, mentioned and referred to in Sec. 9 of said Act; and such an injunction was sought by the said bill. The prayer is for such restraint "until they the said respondents or either of them in behalf of both shall make, present and file with said California Debris Commission their said verified petition setting forth such facts as will comply with the said law, etc., accompanied by said deed or instrument duly executed and acknowledged by the law of said State of California, whereby the said North Bloomfield Mining Co., as aforesaid, surrenders to the United States the right and privilege to regulate by law, etc., etc."

No injury to navigation is directly alleged by the complainant in the bill, and on the argument of the demurrer to the bill before His Honor Judge McKenna, it was frankly stated by the United States Attorney who prepared and defended the bill, that he had sought to exclude all claim of such injury from its allegations, in order that its sufficiency might be tested by general demurrer, upon considerations entirely aside from injury to navigation, so that it might be explicitly determined whether, under the provisions of the Caminetti Act, the respondent could carry on its business, without obtaining a permit from the Debris Commission and making and executing the deed

of Surrender and Cession mentioned and referred to in Sec. 10 of said Act.

From the peculiar method adopted in the bill, for the definition and description of hydraulic mining, his Honor Judge McKenna, who heard the demurrer, thought that perhaps an inference relative to injury to the navigable waters might be drawn therefrom, and therefore overruled respondent's demurrer to the bill, in order that the question might be definitely and clearly presented in some other form; whereupon respondent interposed his answer, by which it was admitted that the defendant corporation was engaged in hydraulic mining in the district referred to by the bill, without filing a petition for a permit, or executing a deed of cession or surrender to the United States, of the right or privilege to regulate the manner of restraint of debris resulting from their hydraulic operations, and the amount of debris to be produced therefrom; but the answer denied the deposit of debris in such place and manner as to interfere with or obstruct navigable waters, and affirmatively alleged that all debris resulting from its hydraulic operations was now effectively impounded and restrained by defendant so as not to do injury to the rights of the plaintiff.

The only relief sought by the bill is that of injunction, and there is no allegation upon which a judgment or decree for damages in any amount can be predicated. To this answer the complainant interposes a general demurrer and exceptions to the sufficiency of the answer, which give rise to the questions now before the Court. These questions naturally divide as follows: 1. Do the terms of the Act require the defendant corporation to file with

the Debris Commission, a petition for a permit to mine by the hydraulic process and to execute a deed, surrendering to the United States, the right to regulate the manner of impounding and restraining debris and the amount to be produced. 2. If so will equity interpose by injunction to enforce the Act.

(a) *The Act leaves it to the option of the hydraulic miner to obtain the permit and make the surrender of rights, or not. If he files the petition and makes the cession or surrender he is entitled to the protection of the Act and the benefits extended by its terms. If he omits or neglects to make the filing and surrender, he may be prosecuted for injuring and obstructing navigable waters, and would be liable for such damage and injury under every method of judicial process and procedure which would have been applicable in the absence of this Act of Congress.*

The complainant's contention, is, pure and simple, that the general government has power to single out a particular industry of the state and, under pretense of a regulation of commerce, prohibit its further existence. None of the authorities cited or referred to by complainant's counsel, support such a proposition. These cases are valuable only as instances and illustrations of what are considered police powers of the several states, and the power of Congress to regulate commerce; and instances of conflict of these powers. No instance has been or can be cited, where it has been held that Congress has the power to entirely suppress any particular single business within the limits of a state. Under its powers of taxation a license tax may be imposed by Congress upon certain business. Means of collecting the tax and enforcing its payment,

and punishment for violations of the law imposing it, are provided; but no attempt has ever been made by Congress to provide a "complete scheme" for the regulation of the business, or for its prohibition, and it is believed that no instance can be found, where the general government brought suit in equity to obtain an injunction by which to entirely suppress or suspend any calling or business in itself lawful. It is settled that a state, under its police powers, may under certain conditions, regulate and even prohibit a business from being carried on within its limits; and this, for the public good; but such power has never yet been affirmed to the national government to interfere, upon any grounds, to this extent, with state affairs.

It is not denied that Congress has full power to regulate commerce; that this power extends to foreign commerce, and internal commerce in its relations to the navigable waters of the State; that as to foreign commerce, the power of Congress is exclusive; that as to the commerce upon internal navigable waters, it is concurrent with that of the state, but when asserted and in conflict with a state regulation, the regulation of Congress is paramount. To this extent, and no further, do the authorities cited by complainant go. If the contention, however, of complainant's counsel is correct, that the present Act is mandatory in its requirements upon hydraulic miners, then it is certain that Congress has made an unconstitutional invasion upon the rights of this state to regulate its own affairs, and has even gone further than the state itself could do under its own constitution; for such law would be distinctly special and unjustly discriminating legislation, since it would apply only to the

hydraulic miner, and there is no reason why a miner by this process should be regulated or prohibited from obstructing or injuring navigation, while miners by any other process, or farmers, and all other persons, should be permitted to do so.

The state itself has not seen fit, under its police or any other power, to make any regulation upon this subject.

But the Act itself bears inherent evidence that Congress intended that a hydraulic miner should exercise *the option* whether to avail himself of the Act, or not. Sec. 10 (27 U. S. Stats. 9) provides as follows:—

"That said petition shall be accompanied by an instru-
"ment duly executed and acknowledged, as required by
"the law of the said state, whereby the owner or owners
"of such mine or mines surrender to the United States
"the right and privilege to regulate by law, as provided
"in this Act, or any law that may hereafter be enacted,
"or by such rules and regulations as may be prescribed
"by virtue thereof, the manner and method in which the
"debris resulting from the working of said mine or mines
"shall be restrained, and what amount shall be produced
"therefrom; it being understood that the surrender afore-
"said shall not be construed as in any way affecting the
"right of such owner or owners to operate said mine or
"mines by any other process or method now in use in
"said state; provided, that they shall not interfere with
"the navigability of the aforesaid rivers."

If this section is mandatory it is thoroughly unconstitutional, as it requires the miner to surrender his right to the use and enjoyment of his mine and the right to

conduct his business and mining operations in his own way not detrimental to the rights of others. If he must surrender this, under the behest of law, he must be afforded just compensation; all this upon elementary principles and upon authorities too numerous for mention here.

But the section above quoted indicates that Congress was unwilling to assume the power to promulgate this scheme for the regulation of hydraulic mining, and for its prohibition because of non-compliance with such regulation, unless the hydraulic miner should voluntarily submit and consent to the exercise of such power, by the formality of execution of a deed for that purpose; the very language itself of the section implies that without such deed or transfer, the right to regulate the manner of the restraint of debris. and the amount produced from mining operations, remained with the owner of the mine; and the unconstitutional purpose of Congress to compel a transfer of the property of the miner to the government will not be presumed; but on the contrary, in construing a statute, such import will be given to it as will allow it to stand every constitutional test. This effect is attained by holding, with the respondent, that the requirements of Secs. 9 and 10 of the Caminetti Act, are directory and permissive rather than mandatory, and this view is supported by the fact that the Act itself provides a penalty for a violation of the terms of the Act, only when such violation is accompanied by or involves injury to the navigable waters, and from the further fact that by section 3 of said Act it is declared:—

"That hydraulic mining as defined in Sec. 8 hereof

directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permitted under the provisions of this Act, is hereby prohibited and declared unlawful."

The language last above quoted deserves careful attention. Hydraulic mining "directly or indirectly injuring the navigability, etc.," is hereby prohibited and declared unlawful. Nothing can be clearer than this language, to the effect that the unlawful act, the act prohibited, is the injury to the navigable streams. The mining operations without filing a petition for a permit, or without making a deed of surrender, were not declared unlawful and were not prohibited; on the contrary, upon the familiar principle and doctrine of *unius inclusio alterius exclusio*, the Act left hydraulic mining without injury to navigable streams exactly where it stood before the passage of the Act.

(b) *Equity will not interfere by injunction where there is other adequate relief or unless there is irreparable injury to property rights.*

If it is assumed for the sake of argument that the provisions of this Act are mandatory and require compliance by all hydraulic miners in said district, and even declares such mining, with or without injury to the navigable waters, to be unlawful and prohibits the same, it would by no means follow that an injunction would lie against such mining, carried on contrary to the terms of the Act.

The Act itself contains certain provisions relative to the enforcement thereof. Sec. 19 of said Act among other things provides:—

" Said Commission shall take necessary steps to enforce " its orders in case of the failure, neglect, or refusal of " such owner or owners, company or corporation, or " agents thereof, to comply therewith, or in the event of " any person or persons, company or corporation, working " by such process in said territory contrary to law."

The only order which the Commissioners are authorized to make is an order:—

" Directing the methods and specifying in detail the " manner in which operations shall proceed in such mine " or mines; what restraining or impounding works, if " facilities therefor can be found, shall be built and main- " tained; how and of what material; where to be located; " and in general set forth such further requirements and " safeguards as will protect the public interests and pre- " vent injury to the said navigable rivers, and the lands " adjacent thereto, with such further conditions and " limitations as will observe all the provisions of this Act " in relation to the working thereof and the payment of " taxes on the gross proceeds, etc." (Sec. 13–27 U. S., 508–509.)

This order is to be made after the hearing of the petition, and this is the only order which the Commission can make to be enforced. The only method of enforcement provided by the Act is by the prosecution of the offenders in a criminal proceeding, and there is good authority for the assertion that the complainant is restricted to the terms of the Act for its enforcement.

Drainage Commissioners of *Sidell and Vance* v. *Sconce et al.*, 38 Ill. App. R., 120.

Under the Drainage Act of 1879 Commissioners had jurisdiction of the ditches in their district, and were compelled to keep the drains in good order, and Commissioners brought suit by a bill in chancery to restrain the defendants from permitting their livestock to pasture upon the lands within the system, to the injury of ditch No. 4. The law provides:—

"That wherever the owner or occupant of land in a "drainage district shall permit animals to pasture in an "enclosed field through which runs an open ditch, said "owner or occupant shall repair such damage to the ditch "as may be done by the animals, and if he neglects to do "so the Commissioner may make the repairs and require "the owner or occupant to pay the amount of the same to "the treasury of the district, and in case of omission to "do so, then the Commission may proceed to collect by "suit at law, etc."

The Court held that the complainants were confined to their remedy at law, and denied the relief.

It is not my aim to add to what has been said by Mr. Cross in his brief as to the necessity of showing irreparable injury as a condition precedent to equitable interference by the Court, except as the question may be involved in points hereafter discussed.

(c) *A court of equity will not interfere by injunction to restrain an act which does not affect property rights injuriously, or merely because such act is unlawful and is prohibited by law.*

The statement of complainant's counsel of our position upon this point is not correct. They say:—

"The defendant's counsel claim in the argument that "the injunction would not lie because the acts complained "of constituted a criminal offense, and the only remedy "was a criminal prosecution."

While it is suggested as in the point last above that the complainant is confined to the only mode of enforcement prescribed by the Caminetti Act, which was criminal prosecution for obstructing and injuring the navigable waters, this by no means states our position. We assert that equity will not restrain an act merely because it is forbidden by law; not that equity will not restrain an act because it has been made a criminal act. An act may be both criminal and subject to penalty by prosecution, and may also at the same time be the cause of irreparable injury to property rights and subject to the injunctive interference of a court of equity.

In re Debs, 158 U. S., 564, page 593.

In this case the petitioner Debs was imprisoned for contempt of court by violating an injunction restraining obstructions to United States mails and interstate commerce. It was contended by the petitioner that the Court had not the power to issue the injunction. It was held that the United States mails were property of the United States. That the obstruction of commerce between states was an injury to the property of individuals such as to warrant equitable interference; but there were direct allegations of obstruction both of the mails and of the interstate commerce. As stated by the learned Justice (page 592):—

"That the bill filed in this case alleged special facts,

calling for the exercise of all the powers of the Court, is not open to question. The picture drawn in it of the vast interests involved, not merely of the City of Chicago and the State of Illinois, but of all the states, and the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of power belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all of the powers of the Court. If ever there was a special exigency, one which demanded that the Court should do all that Courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations."

If it had appeared in the Debs case that no act of the petitioner threatened injury to the mails or the interstate commerce, is there any doubt as to what would have been the decision of the Court under such conditions?

Turn if you please to the allegations of the present bill, and the issue tendered by the answer. Is there any allegation of any injury direct or indirect to the navigable waters or to the commerce of the country? The allegations are that the respondents have failed and are refusing to file two documents with the Debris Commission. Throughout his opinion in the case above referred to Justice Brewer was careful to uphold the general rule that it is outside of the jurisdiction of a court of equity to enjoin the commission of a crime (p. 593); and that as a general rule equity will not interfere where the object sought can be otherwise well attained. He says:—

"This as a general proposition is unquestioned. A chancellor has no criminal jurisdiction; something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the Court. *There must be some interference, actual or threatened, with property or rights of a pecuniary nature,* but when such interferences appear, the jurisdiction of the court of equity arises and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

The authorities upholding our contention are numerous, but before citing or commenting upon them, it is proper to briefly refer to the claim of counsel for complainant that they are not applicable to the present case. Why not applicable? An injunction is asked. The act complained of is alleged to be a violation of law; no injury to property rights is alleged by the bill, and it is distinctively and affirmatively alleged by the answer that no injury to property rights is committed.

No other grounds for equitable relief are suggested than that the act complained of and threatened is one prohibited by law.

If the allegations of the bill as to the requirements of the Caminetti Act were stricken out, nothing would be left of the complainant's case; and it falls strictly within the category of cases in which equitable injunctive interference is sought, to prohibit an alleged unlawful act, merely because it is an unlawful act and is prohibited by law.

(In passing it is proper to say that the United States, when it enters the field of litigation, is bound by the

same rules as private parties. *People* v. *Canal Board*, 55 N. Y. 397.)

The principle now invoked is supported by the following authorities:—

1 High on Injunctions, Secs. 20–760–761;
Attorney General v. *Utica Ins. Co.*, 2 Johns. Ch. 371.

The last case cited above is an early but leading case. The Attorney General asked for an injunction to restrain the defendant corporation from carrying on a banking business in violation of an Act of the Legislature of New York of April 6, 1813.

In this case it was admitted that the act complained of violated the statute, but questioned whether such violation could be punished as an offence.

In the opinion of the Chancellor, the Court says:—

"If the charge be of a criminal nature, or an offense "against the public, and does not touch the enjoyment "of property, it ought not to be brought within the "direct jurisdiction of this Court, which was intended to "deal only in matters of civil right, resting in equity, "or where the remedy at law was not sufficiently ade-"quate. Nor ought the process of injunction to be "applied, but with the utmost caution. It is the strong "arm of the Court; and to render its operation benign "and useful, it must be exercised with great discretion "and when necessity requires it. Assuming the charges "of the information to be true, it does not appear to me "that the banking power, in this case produces such "imminent or great mischief to the community as to call "for this summary remedy. The English Court of Chan-

" cery rarely uses this process, except when the right is " first established at law, or the exigencies of the case " render it indispensable. Thus in Brown's case, in 2 " Vesey, 414, a motion was made for an injunction to " stay the use of a market, and Lord Hardwick said, it " was a most extraordinary attempt, and that the plain- " tiff had several remedies which he might use. * * * " So he observed in another case that the Court granted " an injunction to stay the working of a colliery with " great reluctance, and will not do it, except where there " is a breach of an express covenant, or an uncontroverted " mischief. In a late case, before Lord Eldon (*Attorney* " *General* v. *Nichol*, 16 Vesey, 338), on an information " filed to restrain the defendant from obstructing the an- " cient lights of a hospital, he stated that the foundation " of this jurisdiction, by injunction, was that head of mis- " chief, or those mischievous consequences, which re- " quired a power to prevent, as well as to remedy, and " that there might be nuisances which would support an " action, but which would not support an injunction.

" If the defendants are carrying on banking operations " contrary to law, they ought undoubtedly to be re- " strained; but I cannot be of opinion that the operation " is such a mischief or public nuisance as to require the " necessity or extraordinary process of this Court to " abate it. I know that the Court is in the practice of " restraining private nuisances to property and of quieting " persons in the enjoyment of private rights, but it is an " extremely rare case, and may be considered, if it ever " happened, as an anomaly, for a court of equity to inter- " fere at all, and much less preliminarily, by injunction, to

" put down a public nuisance which did not violate the " right of property but only controvened the general " policy. * * * There are no particular individuals " affected or disturbed in the enjoyment of their private " rights by the banking power assumed in this case. " * * * Here is no encroachment on the property " of the state nor is the mischief of a similar nature. " The objection to the exercise of the banking power in " this case is, that it is unlawful, or not warranted by " law. It would be quite extravagant to hold it to be a " public nuisance, or that kind of annoyance and mischief " which a nuisance implies. The information is founded " on the charge, that the banking power exercised by the " defendants is not given by their charter, and that it is " an offense against the statute. There is no case in " which the information has been sustained in this Court " on such grounds."

In *Sparhawk* v. *Union Passenger Railway Co.*, 54 Pa. St. 402, 420, 423, and 424, and in *Kenton* v. *The Union Passenger Railway Co.* (both cases included in the same opinion), it was held that the running of the cars on the Sabbath day to the disturbance of members of a church and in violation of the laws of the Commonwealth, could not be restrained by injunction. The injunctions were granted by the *nisi prius* court, but were vacated and set aside by the Supreme Court of the state. The suits were brought by private persons. The Court held that, so far as the injury complained of was concerned, it was not a private injury but a public one, and as such not of a character to warrant the interference of equity, and upon this subject the Court says at page 423 of the opinion:—

" It seems to me that this is clearly but a charge of " the violation of the provisions of the Act of Assembly " of 1794 which interdicts worldly employment on the " Sabbath day, and that it describes nothing but the " consequences which were intended to be prevented " by that Act. If this be so, then it is not a case of " special injury, but only that which results from a public " offence or wrong to all, and everyone in the community " alike where the act is committed. It is not possible, I " think, to discover the connection between the cause of " complaint and a private injury, excepting in and through " the act as prohibited by the statute. And if we are to " regard it as a common law offence, the charge in the " bill does no more than describe the fruits of the offence. " Rest and quiet on the Sabbath day, with the right and " privilege of public or private worship, undisturbed by " any merely worldly employment, are exactly what the " statute was passed to protect. (10 Can. 398.) The " deprivation of the privileges is the sum of the com- " plaint, and this bill is essentially, therefore, a bill to " enforce by injunction a penal statute. That is not our " province, especially at the suit of a private party. If " it be supposed that because an act is illegal merely, " equity will interfere to restrain it, it is a misapprehen- " sion of equity jurisdiction. ' If an act be illegal,' said " Vice Chancellor Kindersley, in *Solteau* v. *De Hall*, 2 " Sim. 153, ' I am not to grant an injunction to restrain " ' an illegal act merely because it is illegal. I could not " ' grant an injunction to restrain a man from smuggling, " ' which is an illegal act.' Nor could he for any merely " criminal or penal offence. It is not impossible to con-

" struct a plausible argument on the theory that a viola-
" tion of the law is, without more, a special injury, but
" such an injury would be too shadowy to be the founda-
" tion for equitable interference; and besides the penal
" law is the remedy in such a case to redress it, and
" equity does not interfere."

In *Babcock* v. *New Jersey Stockyard Co.*, 5 C. E. Green (20 N. J. Eq. R. 296), it appears that Babcock, a private person, had brought an action to prevent the defendant from carrying on the slaughter-house business, from private injury and interference with complainant's private rights. A preliminary question was raised whether the defendant corporation was subject to the provisions of an Act of the Legislature prohibiting the carrying on of offensive trades in Hudson County. Upon this question the Court says:—

" This, although it was fully argued, and with great
" ability, by counsel on both sides, I will not determine
" here for two reasons: First, because it is a question of
" law which may be considered doubtful, or that is at
" least in good faith disputed and should be adjudicated
" by the courts of law of this state, and therefore this
" Court must not grant the preliminary injunction founded
" upon that statute. Secondly, and chiefly, because if
" that statute was in force against the operations of this
" Company, it would simply render the manufacture of
" offal and animal remains unlawful; but this Court
" could not enjoin it any more than it could the selling of
" liquor by the small measure without a license, or other
" unlawful acts simply because unlawful, unless it caused

" irreparable injury, for which there was no redress at " law. I have no hesitation in holding, that it was not " disputed by counsel for the defendants that this char- " ter does not empower the defendants to carry on the " business authorized, in a way that would be injurious " to others, or that would materially affect their health, " their comfort or their property."

The injunction was granted purely on the grounds of interference with private property rights.

In the *Emperor of Austria* v. *Day and Kossuth*, 3 Degex, Fisher & Jones, 217, "the defendant Kossuth, a " Hungarian refugee, caused to be manufactured in Eng- " land a large quantity of notes, which though not made " in imitation of notes circulated in Hungary, purported " to be receivable as money in any Hungarian state or " pay office, and to be guaranteed by the state of Hun- " gary. The plaintiff, King of Hungary, sued to have " these notes delivered up and to restrain their manu- " facture, alleging that the issuance of said notes would " injure the rights of the plaintiff by promoting revolu- " tion and disorder, and would injure the state by the " introduction of a spurious circulation, and would thereby " also injure the plaintiff's subject."

The Court held that while it had no power to restrain the commission of acts violating political principles of a foreign sovereign, the injunction should be granted strictly upon the theory that the acts complained of were a violation of property rights.

In the case of *Smith* v. *Lockwood* (13 Barb. 214), the complainants, journeymen sawmakers of the City of New

York, brought suit to restrain within statutory limits the manufacture of saws in the state prison at Sing Sing. The complaint alleged a violation by the defendant of an act of the legislature prohibiting the employment of convict labor under certain conditions, and the Court held that the wrong complained of was a public one and that an injunction would not lie, and in this connection Justice Strong, delivering the opinion of the Court, said:—

"It has been supposed, however (and I see that the "supposition has received the sanction of one of my "brethren for whom I entertain the highest respect), "that the allegations in the complaint would, if proved, "present a proper case for the interposition of this Court "by way of injunction. Injunctions are never granted to "prevent the perpetration or the continuance of a public "wrong (not leading to the special injury of individuals) "unless it constitutes a nuisance imminently dangerous "to the public or some considerable portion of it. In the "*Attorney General* v. *The Utica Insurance Co.* (2 John "Ch. Rep. 378) Chancellor Kent decided that a court "of equity had no jurisdiction of an offence against a "public statute. He said very truly that the powers of "injunction should be applied with the utmost caution. "It is the strong arm of the Court, and to render this "operation benign and useful, it must be exercised with "great caution, and when necessity requires it. It is an "extremely rare case and may be considered if it ever "happened as an anomaly for a court of equity to interfere at all, and much less preliminarily by injunction to "put down a public nuisance which did not violate "the private rights of property but only contravened

" the general policy. In the *Mayor* v. *Thorn* (7 Paige,
" 261) Chancellor Walworth said that a court of equity
" does not interfere to enforce the penal laws of the state
" by injunction unless the act sought to be restrained is
" a nuisance. * * * The statute in this case fur-
" nished an adequate remedy for the public wrong, and
" if it does not indemnify those who pursue any mechan-
" ical trade for the incidental injury which they as a
" class may sustain it is because human means cannot
" furnish a remedy for every injury, and it is better that
" some minute evils should go unredressed than that a class
" of remedies should be adopted which would be pro-
" ductive of more harm than benefit.

" Limits of the powers of injunction have been pre-
" scribed by the wise and good men who have presided in
" the courts of equity in this state and in the mother
" country, and I am not inclined to go beyond them."

The case of the *Mayor of Hudson* v. *Thorn* (7 Paige, 261) referred to by Justice Strong in the case cited last *supra*, was one in which the Mayor of the City of Hudson sought injunction to restrain the erection or construction of a wooden frame building within the limits of said city in violation of an ordinance of that city.

In *Moore* v. *Brooklyn City R. R. Co.* (108 N. Y. p. 98), it was sought by complainant to compel the defendant to maintain the terminus of its railroad at a given point according to an act of the legislature, and to prevent it from changing it from that point. The complainants were the Commissioners of Highways of the City of Brooklyn. The court below denied the relief and the

Court of Appeals affirmed the judgment. It is said in the opinion—

"It is, we think, a conclusive answer in this case to the "remedy by injunction that no public injury will result "from the proposed act of the defendant. The threat- "ened violation of a mere naked legal right, unaccompanied "by special circumstances, is not a ground for injunction "when, as in this case, legal remedies are adequate to "redress any resulting injuries."

In *McHenry* v. *Jewett* (90 N. Y. p. 58), the plaintiff was the owner of certain shares of railroad stock transferred on the books of the company to the defendant as trustee for a person to whom they had been pledged by the plaintiff. Plaintiff sought to restrain the defendant from voting the shares at a meeting of the stockholders. *Nisi prius* Court granted the preliminary injunction, from which the defendant appealed. Chief Justice Andrews, delivering the opinion of the Court, says:—

"It is claimed on the part of the plaintiff that within "the general rule that a pledgee has no right to use any "pledge, the defendant is not entitled to vote upon "the shares, which, it is insisted is a use of the "shares in violation of this rule; on the other hand "the defendant claimed that the voting power "passed to the pledgee of corporate shares trans- "ferred on the books of the corporation to the "pledgee as incident to the pledge, and according to the "presumed intention. Without considering this ques- "tion but considering the plaintiff's claim, it does not fol- "low that he is entitled to an injunction restraining the

" defendant from voting on the shares. It is not suffi-
" cient to authorize the remedy by injunction, that a vio-
" lation of a naked legal right of property is threatened.
" There must be some special ground of jurisdiction, and
" where an injunction is the final relief sought, facts which
" entitle the plaintiff to this remedy, must be averred in
" the complaint and established on the hearing. The
" complaint in this case is bare of any facts authorizing
" final relief by injunction, neither injury to the property,
" inadequacy of the legal remedy, or any present or seri-
" ous emergency or danger of loss or other special ground
" of jurisdiction is shown by the complaint; and the com-
" plaint therefore does not show that the plaintiff is enti-
" tled to final relief by injunction."

In the village of Brockport (13 Abbot's New Cases, p. 469), the Court refused to enjoin the construction of certain wooden buildings within established fire limits contrary to ordinance. After referring to the *Mayor* v. *Thorn* (7 Paige, 261, *supra*) and other authorities, Justice Rumsey, in delivering the opinion of the Court, says:—

" With this array of authorities against the claim of
" the plaintiff, I shall feel bound to vacate this injunction,
" unless there is something in the act for the incorpora-
" tion of villages which gives to a court of equity, juris-
" diction to enforce such an ordinance. It is a well set-
" tled law in this country that when a statute describes
" the mode of enforcing an ordinance, no other mode can
" be pursued (Dillon Mun. Corp. 3d Ed., Sec. 410).
" The statute in this case has prescribed that the trus-
" tees may impose for the enforcing of this ordinance a

" penalty of one thousand dollars, which they have done. " To enforce an ordinance of this kind does not mean to " prevent its violation but to recover the penalty or " inflict the punishment imposed for disobedience, and so " we have the word used in the text writers (Dillon Mun. " Corp. Sec. 409–412)."

The Village of Waupun v. *Moore* (34 Wis. 450). An ordinance of Waupun Village prohibited the erection of wooden buildings within fire limits, imposing a penalty of fifty dollars for violation. The ordinance itself authorized suit in a court of equity for injunction to restrain violation. The complainants, the president and trustees, brought such suit against the defendant Moore. The injunction was denied on the grounds that no injury was shown and that an ordinance could not confer equitable powers upon a court in such cases.

The Court (Lyon, J.) says:—

" The jurisdiction of courts of equity in proper cases, " to restrain the erection or maintenance of a nuisance, " public or private, is undoubted; but the defendant was " not about to erect a nuisance; it is unlawful for him to " erect the building in question; it is made so by the " ordinance alone; without the ordinance, no one can suc- " cessfully dispute his right to do so. The question is, " therefore, will a court of equity enjoin an act which " would otherwise be lawful, but which is made unlawful " by a village ordinance or by law?

" We find the principle stated in several very respect- " able authorities, that equity will not lend its aid to " enforce by injunction the by-laws or ordinances of a

" municipal corporation, restraining an act, unless the act " is shown to be a nuisance, *per se*. (High on Injunctions, " Sec. 788; *Mayor, etc., of Hudson* v. *Thorn*, 7 Paige, " 261; *Philips* v. *Allen*, 44 Pa. St. 481; Eden on Injunc- " tions, 160; *Schuster* v. *Metropolitan Board of Health*, " 49 Barb. 450; Grant on Corporation, 84; 78 Law " Library, 94.) To hold that an injunction can properly " issue in this case, would be to overturn all of the author- " ities on the subject, and to interpolate into the law " a new rule or principle of equity jurisprudence. This " we have no right or authority to do. We may not " make the law, but only declare it as we find it."

The Village of St. John v. *McFarlan* (33 Mich., p. 72). This was another suit brought to restrain the violation of ordinances establishing fire limits by the construction of wooden buildings. This case goes further than any of the other cases cited. It was claimed that if the relief by injunction was refused there was no other adequate remedy, as there was no penalty prescribed, a claim similar to the one made in the case at bar. It was distinctly held that injunction would not apply unless the act complained of was in itself a nuisance; the act might be prohibited and be in itself illegal, but this did not give equity jurisdiction; something more was required. Referring to the fact that there was no other remedy, the Court says:—

" This may be true under the ordinance set forth. " That the legislature, however, can give the village " power to establish fire limits and enforce obedience " thereto was not denied, and could not well be. If a " proper ordinance was framed with the appropriate " penalty for all violations of its provisions, we think

" that the remedy at law would be found adequate. The " fact that the remedy was not adequate in this particu- " lar case, on account of the ordinance not being suffi- " ciently stringent in its provisions, cannot give this " court jurisdiction to interfere."

Particular attention is invited to the case of the *Health Department of the City of New York* v. *Purdon* (99 N. Y. 237). The action was brought by the plaintiff the Board of Health to restrain the sale of adulterated teas made in violation of laws prohibiting the sale of adulterated goods. The General Term of the Superior Court of the City of New York refused the injunction, and the Court of Appeals affirmed the judgment. It was held by the Court that although the teas sold were in fact adulterated, it must appear that the teas were dangerous to human life or detrimental to health, or unwholesome, or the occasion of great public inconvenience, before an injunction could issue. This case goes over the authorities and holds that although it appeared that the teas were somewhat adulterated, this was only one element necessary to be established; it must also appear by clear, incontrovertible evidence, to be a case of pressing necessity and imminent danger of great and irreparable damage, in order to warrant injunctive interference; "for if the evidence be conflicting and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition." The evidence in that case was wholly expert evidence, and conflicting at that, and the Court refused to disturb the findings of the court below upon this question. This case has another significance in view of the claim made by the

counsel for the complainant, that the answer admits the escape of certain light flocculent matter from the hydraulic mines of respondent, into the navigable waters, but denied to it any injurious effect. Under the case last above cited, it is clear that this is simply a question of fact, and if the fact is as alleged by the answer it is a complete defense.

In the case of *State ex rel Wood, Atterney-General* v. *Schweickardt et al.* (19 S. W. Rep., p. 47) the state, through the Attorney-General, brought suit to restrain the defendants from selling whiskey, wine, liquor, or any kind of intoxicant refreshments in Forest Park, St. Louis, and from carrying out the terms of the provisions of a certain ordinance relative thereto. The Court held that injunction would not lie, going thoroughly over the authorities on this subject and concluded its opinion as follows:—

" If such a proceeding as this can be upheld either as " to injunctive relief, or to obtaining a decree declaring " null any ordinance which any one of the numerous cities " of this state may enact, to open or to close some blind " alley, or to arrest some vagrant, or to remove some " dead animal, or to correct some foul odor, then the time " of the Attorney-General and all his subordinates will " be very largely occupied, and the different circuit " courts will be speedily thronged with such causes."

It is impossible to read these cases without coming to the conclusion, that the fact that an act has been made criminal, or is prohibited by law, is wholly a false quantity in determining the question whether it is restrainable by

equity or not. If the act cannot be restrained without prohibitory law, it cannot with it. The equity jurisdiction depends upon other conditions; whether the act in itself, without reference to interdiction by law, will cause injury to property rights in a pecuniary sense; whether such injury is irreparable; whether it can be avoided by the conduct of the complainants; whether there can be an adequate remedy at law; and whether some other remedy is prescribed by law; but the question of injury, and of its nature, relates to property rights in a pecuniary sense. If these conditions coincide and coexist, and the injury is clearly established and the right of the complainant and his injury are clearly established, equity will interfere by injunction whether the act be criminal or not, or prohibited or not. If they do not exist, then equity will not grant relief by injunction, whether the acts are prohibited or not. Usually a legislative act prescribing an offence and prohibiting conduct, does not attempt to confer injunctive powers upon the courts for enforcement of such enactment. Sometimes, however, this is done, and in some instances courts have declined to act under such authority.

In the case of the *City of Janesville* v. *Carpenter*, 77 Wisconsin, 288 (cited and quoted from at length by Mr. Cross in his brief) such power was conferred upon the Court and was rejected. Under the Act of July 2d, 1890 (26 U. S. Stats. 209) prohibiting conspiracies to obstruct the United States mails, and the interstate commerce, such powers were expressly conferred upon the several circuit courts. In the opinion of the Court in *In re Debs*, *supra*, however, they declined to ground their decisions

upon this act. At the close of the opinion the Court says:—

"We enter into no examination of the Act of July "2d, 1890, c. 647, 26 Stats. 209, upon which the Circuit "Court relied mainly to sustain its jurisdiction. It must "not be understood from this that we dissent from the "conclusions of that Court in reference to the scope of "the Act, but simply that we prefer to rest our judg- "ment on the broader ground which has been discussed "in this opinion, believing it of importance that the prin- "ciples underlying it should be fully stated and affirmed."

The power of equity to restrain obstruction to navigation existed long prior to the passage of the Caminetti Act. As shown by the briefs in this case on both sides, it has been exercised. No provision of the Caminetti Act purported to or had the effect to disturb, or in any way change, the equitable jurisdiction of the Courts; so that the allegations of the bill to the effect that a debris commission had been appointed and organized, that the Caminetti Act had been passed and gone into effect, that it required the respondent, if it desired to mine by the hydraulic process in the district referred to, to file a certain petition and to make, execute and deliver a certain deed of surrender, and prohibiting it from mining unless it complied with such requirements, are wholly immaterial averments, so far as they relate to the relief demanded, and are subject as such to be stricken from the bill upon the motion of the respondents.

To say: "It is true that equity will not interpose to restrain a criminal act where some right of property or

right of control is not involved," is not an adequate statement; it is true, but it is not half the truth. Equity will not interpose unless there is a threat of irreparable injury to property and there is not other adequate relief. There are many rights of property, and rights of control of property not thus protected; as for instance in ejectment, of which the essence is the right to the possession and control of property, equity does not grant relief, *pendente lite*, or permanent. There are comparatively few cases involving rights of property and control of property in which equity interposes by injunction. While it has been held that the navigable waters of the country, both foreign and internal, may be regarded as property in such sense as to meet the rule now contended for, and to warrant a court of equity in enjoining injury to navigation (*Gilman* v. *Philadelphia*, 3 Wall. 713–724), not a single case can be found in which such relief was granted, where there was not a direct overt act and threat of obstruction to navigation. The most diligent search has not enabled us to find such a case. In every instance in which this form of remedy has been resorted to, it has been against some act, which in itself directly interfered with navigation, such as the construction of wharves, piers, bridges, dams, etc., etc. Not one single instance has been cited by the counsel for complainant in which injunction was sought to restrain injury to navigation, where the question was not left open for the determination by the Court, whether the act complained of did or did not contribute to the injury of navigation. On the contrary, the authorities are uniformly the other way (*Gunter* v. *Geary*, 1 Cal. 466; *Middleton* v. *Franklin*, 3 Cal. 241;

Blank v. *Klumpke*, 29 Cal. 156; *People* v. *Davidson*, 30 Cal. 319).

In the New York case, in which the Court refused to enjoin the sale of adulterated teas (*Health Department* v. *Purdon*, 99 N. Y. 237), the question of injury and damage was held to be the subject of inquiry as a vital issue in the case.

In the Debs case (158 U. S. 564), *supra*, the Court discussed this question. The acts complained of, among others, were direct interference with interstate commerce, and the power of equity to restrain obstruction of this kind to such commerce. As has been seen, such injunctive power was upheld in that case, upon the grounds that the interference was with property rights under charge and protection of the government, to which the acts complained of contributed direct injury. If it had been established at the trial in that case, or it had been admitted to be true, that no act of the petitioner Debs, set forth by the bill, upon which the injunction in that case was founded, committed any injury, or in any way contributed to the obstruction of the United States mails, or interstate commerce, is it possible to believe that the Court in that case would have sustained the injunction?

In the case at bar, the denials and allegations of the answer are to be taken as true for present purposes, and the truth so stated is:—

That the respondent is mining in the State of California, in the district drained by the Sacramento River, and that its operations are by the hydraulic process.

That he has omitted to file a petition for a permit to so mine with the California Debris Commission, or to sur-

render or transfer to the United States, by deed or otherwise, his right to carry on and regulate his hydraulic mining operations.

That by said mining operations and such omission he has neither committed, or threatened, any injury or obstruction to commerce or to navigation of any of the navigable waters of said state, or of the nation.

CONCLUSION.

In conclusion, we contend, that the scheme presented by the Caminetti Act is one offered to the hydraulic miner for his acceptance, and if accepted, has the effect of relieving him from responsibility or liability to the United States for any injury or obstruction to commerce or the navigable waters, so long as the Act is complied with; just as a bridge or other obstruction to navigation is, because so authorized, a lawful structure, however much it may interfere with public right of navigation (*State* v. *Wheeling & B. Bridge Co.*, 18 How. 421; *Silliman* v. *Bridge Co.*, 2d Wall. 403; *Georgetown* v. *Canal Co.*, 12 Pet. 97; *H. & S. J. R. Co.* v. *M. R. P. Co.*, 125 U. S. 260); that to compel by mandatory laws the hydraulic miner to petition the government for permission to enjoy the right of ownership of his own property (Sec. 9) and to surrender to the United States his right to regulate the manner of such enjoyment (Sec. 10), and of pursuing an innocent and legitimate business, simply because he carries it on in a certain prescribed district, and his property happens to be situated in that district, would be an unconstitutional exercise of power by the general government, and the Court

ought not to give such meaning and intent to any statute, but on the contrary should construe it so that the act may harmonize with constitutional requirements.

We have also shown that by the very terms of the Act, hydraulic mining without injury to navigation is not declared to be unlawful, and is not prohibited by the Act; but if it were otherwise, and the acts of the respondent complained of are unlawful, nevertheless the Court cannot grant relief, in the form of injunction, because there is an entire absence of irreparable or other injury to commerce or the navigable waters of the state, or United States, and because a court of equity will not interpose to restrain the commission of any act merely because it is illegal or prohibited by law.

We respectfully submit that the judgment of the Circuit Court should be reversed.

C. W. CROSS,
Solicitor for Appellant.